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No. ....
IN THE

Supreme Court of the United States

October Term, 1980

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PAUL J. HALL,
MANATT, PHELPS, ROTHENBERG & TUNNEY,
1888 Century Park East,
Twenty-First Floor,
Los Angeles, Calif. 90067,
(213) 556-1500,
Counsel for Petitioner.

MARSHALL MANLEY,
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & MANLEY,
2029 Century Park East,
Suite 2600,
Los Angeles, Calif. 90067,
(213) 557-0111,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

The petitioner, Southern California Financial Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on September 10, 1980.

QUESTIONS PRESENTED

1. Where the United States has effectively taken the fee or other permanent interest in land through a series of congressionally authorized condemnation suits that purported to take a lesser interest, may the landowner be denied compensation under the Fifth Amendment on the ground that the Executive failed to request from Congress a sufficient appropriation for the interest in land actually taken?

2. Does the sole remedy of asserting bad faith or abuse of discretion as a defense against a condemnation suit satisfy the Fifth Amendment requirement that the owner receive just compensation for private property actually taken for public use?

3. After the United States sought and obtained an order of the District Court striking the defense of abuse of discretion from the landowner's answer to the complaint in condemnation, thereby leaving only the Court of Claims with jurisdiction to hear the issue, may the Court of Claims ignore its own controlling precedent and send the landowner back to the District Court to attempt to litigate the same defense previously stricken on the United States' motion?

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OPINIONS BELOW

On October 1, 1979, after a full trial on the issue of liability, the United States Court of Claims, Trial Division, filed its Opinion, Findings of Fact and Conclusion of Law (Appendix ["App."] A) holding that petitioner is entitled to recover just compensation for the taking of the fee or other permanent interest in the land which is the subject of this case. On September 10, 1980 the United States Court of Claims dismissed the petition on the ground that, as a matter of law, there was no express or implied authorization for the taking where the executive branch had failed to obtain an appropriation from Congress for the specific interest in land that was taken. The Opinion of the Court of Claims, not yet reported, appears in Appendix B hereto.

JURISDICTION

This action is brought pursuant to the Fifth Amendment and the Tucker Act, 28 U.S.C. §1491. The judgment of the United States Court of Claims was entered on September 10, 1980. A timely motion for rehearing *en banc* was denied on October 31, 1980 (App. C), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

Constitutional Provision and Statutes Involved

The following constitutional provision and statutes involved in this case are set forth in Appendix J:

Fifth Amendment, United States Constitution;
The Tucker Act, 28 U.S.C. §1491;
The Declaration of Taking Act, 40 U.S.C. §258a;
10 U.S.C. §§2663, 9773.

STATEMENT OF THE CASE

This is an inverse condemnation action pursuant to the Fifth Amendment and the Tucker Act, 28 U.S.C. §1491.

Petitioner Southern California Financial Corporation owns in fee simple a tract of land adjacent to the bomb and ammunition storage area of March Air Force Base in Riverside, California. The Air Force requires the use of 119.5 acres of petitioner's property to serve as part of a safety or buffer zone around the ammunition dump. Upon trial of this action it was stipulated that this is a valid public purpose and that petitioner's property is necessary for the safety or buffer zone. (Plaintiff's Exhibit 78, p. 12, ¶6; Tr. 32; App. A, Finding 15).

The ammunition dump is of permanent construction on land owned in fee simple by the United States. At trial it was stipulated that March Air Force Base is now and will

be in the foreseeable future a major military installation of the U.S. Air Force and that, so long as ammunition storage areas are necessary to its function, a safety and buffer zone surrounding the ammunition dump will be required. There are no plans to discontinue the use of March Air Force Base or the ammunition dump, and the trial judge concluded that the Government has a permanent need for petitioner's property. (App. A, Findings 16-18).

In order to secure the use of the subject property for the safety zone, from 1949 through 1961 the Government leased the property from petitioner's predecessors in interest pursuant to an unbroken series of one-year leases. The non-exclusive leases provided that the lessor retained joint use of the property, for agricultural purposes only. (App. A, Finding 2). In 1961 the owner declined to voluntarily renew the lease, and from 1962 through the present the Government has maintained uninterrupted control over the property by condemning successive leases for a fixed term, generally in five year blocks consisting of a one-year lease with four one-year renewal options. The Government has proceeded by way of declaration of taking and concurrent condemnation suit pursuant to the authority of the Declaration of Taking Act, 40 U.S.C. §258a, and 10 U.S.C. §§2663, 9773, which authorize the acquisition of land for military purposes. (App. A, Findings 4-14).

The basic one-year term of the successive leasehold condemnations is not reflective of any temporary character of the Government's need for the property, which it recognized to be a permanent need as early as 1956. (App. A, Findings 20-30). Rather, the Air Force has continued to acquire the property through condemnation of successive one-year leases because this was less expensive than acquisition of the fee or other permanent interest (App. A, Findings 25-30, 34) and for reasons of administrative convenience. Spe-

cifically, acquisition of these successive one-year leasehold interests allows the leases to be funded from the Air Force's annual operation and maintenance budget rather than requiring authorization under complicated procedures of an annual Military Construction Program. (App. A, Findings 34-38).

The series of leases the Government has condemned provide for non-exclusive use, reserving to the landowner the right to conduct agricultural operations but prohibiting commercial and residential development and gatherings of more than twenty-five persons on the property. (App. A, Findings 5(c), 8(c), 10(c), 12-14). However, given the facts that cultural costs and property taxes on the land far exceed the value of crops that can be raised on the semi-arid parcel, the right to conduct agricultural operations that is reserved to petitioner is worthless. At trial both plaintiff's and defendant's expert witnesses agreed that the property is not economically suitable for conducting agricultural operations. (App. A, Findings 49-52; Tr. 67-71, 74-77, 103-108, 351, 353-354).

Since commercial or residential development of the property is now prohibited by the Government's condemned leasehold interest, and since the property is not economically suitable for agricultural operations, the only other possible use for the property would be holding for development in the future. At trial both plaintiff's and defendant's expert real estate appraiser witnesses agreed that, considered apart from governmental restrictions on use, the economically viable use of the property would be to hold for speculation for future development, though they differed somewhat on the precise timetable on which development could be expected to occur. (Tr. 122-123, 171-173, 351, 355, 357; App. A, Findings 53-57, 65-69). However, since the Government has a permanent need for the subject property as

a safety and buffer zone for the ammunition storage area (App. A, Findings 14-18), petitioner will never be restored to unrestricted possession of the property and will never be able to develop it.

Under the formal terms of the leases condemned by the Government, petitioner has a reversionary interest in the property, but that interest exists only "on paper." Since petitioner will never get the property back due to the Government's need for a safety zone around the ammunition dump, the reversionary interest is not real and has no value. (Tr. 132-134, 173-174, 177-179, 186-187, 189). Agriculture, the only use allowed under the terms of the Government's condemned leases, also has no economic utility (App. A, Findings 49-52), and petitioner has therefore been deprived of any and all uses of the property. Under these circumstances, a taking of the fee or other permanent interest in the property has occurred. (App. A, Finding 71).

Petitioner purchased the property in 1969, and the next of the Government's successive leasehold condemnation actions was instituted in 1972. Petitioner's answer to the complaint in condemnation alleged affirmative defenses that: (1) the selection of the land to be condemned was arbitrary and capricious, and (2) the Government's condemnation of a succession of one-year leases had actually effected a taking of the fee, for which petitioner should be compensated in the condemnation court. (App. F at 63-64). The Government moved to strike the affirmative defenses on the grounds, *inter alia*, that "The Estate Taken is a Temporary Interest by the Terms of the Taking" and that "The Defendant May Not Challenge the Estate Taken in This Proceeding [in the District Court]." (App. G at 71, 73). Thereafter, petitioner filed a notice of non-opposition to the motion to strike the affirmative defenses, reserving its right to pursue the issues raised in the Court of Claims.

The District Court granted the United States' motion to strike the affirmative defenses. (App. A, Finding 48; App. H, I). Thereafter, petitioner filed the present action in the Court of Claims, and the condemnation proceedings in the District Court have been stayed pending the outcome of this action.

Upon trial of the action, the Court of Claims, Trial Division, held that petitioner has been deprived of all reasonable uses of its property; that an authorized inverse condemnation of petitioner's land took place in 1973; that petitioner is entitled to just compensation upon delivery of an appropriate deed to the Attorney General; and that the amount of compensation and the specific interest to be conveyed by the deed should be determined in further proceedings in accordance with Rule 131(c), Rules of the United States Court of Claims.

Without questioning any of the trial judge's findings of fact (App. B at 43), the Court of Claims dismissed petitioner's claim on the sole ground that the taking was not authorized and, thus, not compensable where the Executive could, but did not, secure a sufficient appropriation from Congress for an interest in land of the magnitude actually taken. (App. B at 43-48). The Court stated that petitioner's remedy was to seek dismissal of the condemnation suit or, if necessary, an injunction against the taking on the grounds that the Government's practice of securing a permanent interest through the device of successive condemnations of term interests is not in good faith or in the exercise of proper discretion. (App. B at 48-49).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict With the Prior Decisions of This Court, the Courts of Appeals and the Court of Claims Itself.

This case presents the question of whether a property owner may recover money damages as just compensation under the Fifth Amendment where the Government institutes a formal condemnation suit but actually takes a greater interest in land than that specified in the declaration of taking.

It is settled law that the landowner's remedy for the actual taking of property which is not included in the declaration of taking does not lie in the condemnation court. Rather, the remedy is an action for damages under the Tucker Act in the Court of Claims. *United States v. 40.60 Acres of Land, Etc.*, 483 F.2d 927, 928 (9th Cir. 1973); *United States v. 3317.39 Acres of Land, Etc.*, 443 F.2d 104, 106 (8th Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); *United States v. 1440.35 Acres of Land, Etc.*, 438 F.Supp. 1070, 1071-1074 (D. Md. 1977). Consistent with these authorities and the Court of Claims' own decision in *Peerless Coal Co. v. United States*, 215 Ct.Cl. 1045, 1046 (1978), the Court of Claims, Trial Division, found that the Government had taken the fee or other permanent interest in petitioner's land and that petitioner was entitled to recover just compensation for the value of the interest taken.

The Court of Claims concluded that the taking was not authorized and therefore not compensable, and that petitioner's proper remedy was to seek dismissal of the condemnation suit or, if necessary, an injunction against the taking. This decision conflicts with the Court of Appeals decisions cited above, which hold that a landowner's remedy is a suit under the Tucker Act in the Court of Claims where the gravamen of the complaint is that the Government has

actually taken a greater interest in land than that specified in its declaration of taking.

The decision below further conflicts with the prior decisions of this Court and the Court of Claims regarding the authorization that is necessary to give rise to a compensable taking. If sustained, the Court of Claims' decision would vitiate the Fifth Amendment and the Tucker Act as remedies by which a landowner could obtain money damages as compensation for the Government's actual taking of a greater interest in land than that alleged in its declaration of taking.

In the case at bench, the executive branch manifestly did have congressional authorization for the actions that it took. The series of condemnations of a term interest in petitioner's property that resulted in an effective taking of the fee or other permanent interest were all brought under the express congressional authority of the Declaration of Taking Act, 40 U.S.C. §258a, and the authorization granted to a Secretary of a military department to designate and acquire property necessary for military operations, 10 U.S.C. §§2663, 9773. (App. A, Findings 5(b), 8(b), 10(b), 12-14). Thus, there was unquestionable congressional authority for the acts that resulted in the taking for which petitioner seeks just compensation.

The relevant inquiry is whether the *acts* of which petitioner complains were authorized; the fact that budget-minded Air Force officials might not have foreseen the *legal consequence* of those acts has no bearing on petitioner's entitlement to just compensation under the Fifth Amendment and the Tucker Act. In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922), Mr. Justice Holmes explained that:

> "As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the *acts* even if the possible

> *legal consequences* were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not." (Emphasis added).

See also United States v. Causby, 328 U.S. 256, 267 (1946). *Cf. Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (The Constitution's principle of just compensation "measures a taking of property not by what a State says, or by what it intends, but by what it *does*.").

The *Portsmouth Harbor* analysis quoted above is basic to determination of whether there was express or implied authorization for a compensable taking. The principle stated was central to the trial judge's opinion (App. A at 9), and it was not disputed between the parties to this action upon hearing in the Court of Claims.[1] However, this principle was never even mentioned in the Court of Claims' opinion, although rejection of this controlling principle regarding the issue of authorization for a compensable taking is the implicit basis for the decision below.

The Court's conclusion that the taking was not authorized and therefore not compensable where the Executive could,

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[1]The trial judge's opinion and findings (App. A at 9, 39) rejected the argument that the taking was not authorized, and this point was neither excepted to nor briefed by the Government in its exceptions to the trial judge's opinion and findings before the Court of Claims. *See* Rules 141, 143 and 144 of the Rules of the United States Court of Claims. Regarding the trial judge's Intermediate Conclusion of Law and Fact No. 72, that "the taking was authorized" (App. A at 39), the Government excepted to the implication of permanence in the word "taking" but did not except at all to the conclusion of "authorized". (Defendant's Exceptions to Trial Judge's Findings of Fact and Intermediate Conclusions of Law and Fact and Conclusion of Law at 10). Since there is nothing in Defendant's Rule 143 Memorandum of Law to the Court of Claims that disputes the conclusion that the taking was "authorized", the Government apparently accepted the trial judge's opinion on this point.

but did not, secure a sufficient appropriation from Congress for the interest in land actually taken is irreconcilable with *Portsmouth Harbor* and *Causby*. Just as in the present action, those cases involved actions of military authorities that could be deemed to impose an easement or servitude on private property and thereby give rise to a taking compensable under the Fifth Amendment. Just as in the present case, the military authorities could have obtained, but did not obtain, an appropriation for the specific interest in land for which the property owner sought just compensation. Nevertheless, this Court found implied authority for the takings in those cases based on the objective acts, not the subjective intent, of the Government officers.[2]

The decision below is almost exclusively concerned with protecting Congress against a potentially spendthrift Executive in matters of intra-governmental procurement practices, and it ignores the Fifth Amendment's purpose:

> "to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

The typical inverse condemnation case is " '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the gov-

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[2]*Portsmouth Harbor* and *Causby* cannot be meaningfully distinguished from the present action on the ground that they are "physical intrusion" cases. (App. B at 47, n. 6). In the case at bench, petitioner will never be allowed to use its property because it is *necessary* for a *safety* and buffer zone adjacent to the permanent bomb and ammunition storage area of March Air Force Base. (App. A, Findings 15-18, 22, 28, 71; App. B at 41). In *Portsmouth Harbor* the gravamen of the case was not a technical trespass but, rather, the threat that the artillery shells fired overhead might fall on plaintiff's property. The case at bench involves exactly the same kind of threat: the possibility of injury due to an explosion at the adjacent bomb and ammunition storage facility.

ernmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *United States v. Clarke*, 445 U.S. 253, 257 (1980). The case at bench illustrates this model, for petitioner seeks to recover for that portion of its rights in the property that the Government has taken in fact, though without formal condemnation. But the Court of Claims' rationale would bar recovery in the typical case where the taking agency failed to follow available procedures to secure an appropriation.

The decision below also squarely conflicts with the Court of Claims' recent decisions in *Foster v. United States*, ... Ct.Cl. .... , 607 F.2d 943, 949-951 (1979), *Benenson v. United States*, 212 Ct.Cl. 375, 387-388, 548 F.2d 939, 946-947 (1977), *Drakes Bay Land Co. v. United States*, 191 Ct.Cl. 389, 409-413, 424 F.2d 574, 585-587 (1970), and *Eyherabide v. United States*, 170 Ct.Cl. 598, 606, 345 F.2d 565, 570 (1965). In each of these cases federal officers, acting within the scope of their duties as in the case at bench, did acts which resulted in the legal consequence of a compensable taking. But in each of these cases the taking agency did not have an appropriation of funds for the property at the time of the taking. The rationale of the decision below would require an opposite result in each of these cases, and it throws the law on this subject into turmoil.

In *Foster, supra*, the Government had purchased certain land for Vandenberg Air Force Base pursuant to a deed that contained a reservation of mineral rights in the grantors, their successors and assigns. Later the Air Force prevented the plaintiffs from using their mineral rights, yet it did not condemn those property interests. *Id.* at 607 F.2d 949-950. Although the Air Force's actions had resulted in an actual taking of an interest in land for which Congress had not

made an appropriation, the Court concluded that plaintiffs were entitled to be compensated. *Id.* at 607 F.2d 951.[3]

In *Benenson, supra*, the Court concluded that there was an authorized and compensable taking even though Congress had specifically considered acquisition of the Willard Hotel, had not appropriated funds for acquisition, and "there was no indication as to when or if Congress would provide the essential funds." *Id.* at 212 Ct.Cl. 387, 548 F.2d 946-947.

In *Drakes Bay, supra*, Congress appropriated funds that could have been used to acquire the plaintiff's property, but the Department of the Interior chose to spend the appropriations on other parcels and exhausted its funds without buying plaintiff's land. *Id.* at 191 Ct.Cl. 409-411, 424 F.2d 585-586. In holding that plaintiff was entitled to recover compensation for the fee, the Court explained that:

> "It may be thought that our holding frustrates the intent of Congress because that body obviously intended that payment for land acquired for the National Seashore should be made out of funds budgeted and appropriated by it in modest amounts annually. The trouble is, it intended other things too. . . . As to Point Reyes, the Congress must be presumed to have been aware that it had previously enacted a Tucker Act, which was available in case the convergent pressures on any landowner became great beyond its expectation,

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[3]The Court also noted that, as a practical matter, the Government could never allow plaintiffs to mine their mineral deposits because they would not be allowed to use military roads or conduct blasting operations that would interfere with missile launching and tracking. *Id.* at 607 F.2d 950. Similarly, in the present case, the Government could never allow petitioner to use, develop or dispose of its property because the property is necessary for a safety and buffer zone adjacent to the permanent bomb and ammunition storage area of March Air Force Base. (App. A, Findings 15-18, 22, 28, 71; Plaintiff's Exhibit 79 at p. 22, lines 1-12).

as it has saved the day in many another sticky situation." *Id.* at 191 Ct.Cl. 413, 424 F.2d 587.

In *Eyherabide v. United States,* another case involving the activities of military authorities with regard to land adjacent to a base, the Court rejected the argument that the taking was not compensable because not authorized. The Court noted that the acts of the military personnel were within the general scope of their duties, and "[t]hey cannot be characterized as unauthorized merely because they may have been mistaken, imprudent or wrongful." *Id.* at 170 Ct.Cl. 606, 345 F.2d 570. But the holding of the decision below is precisely the opposite: it denies compensation for the taking because the Air Force by-passed Congress' appropriations procedures.

These conflicts justify the grant of certiorari to review the judgment below.

2. The Court of Claims' Decision That Petitioner Should Seek Relief in the District Court Departs so Far From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In the condemnation action filed in the District Court in 1972, the Government moved to strike petitioner's affirmative defenses that: (1) the selection of the interest to be condemned was arbitrary and capricious, and (2) the Government's condemnation of a succession of one-year leases had actually effected a taking of the fee, for which petitioner should be compensated in the condemnation court. (App. F at 63-64; App. G). Concluding that the Government's motion to strike was well taken, petitioner filed a notice of non-opposition to the motion to strike, reserving its right to proceed in the Court of CLaims, and the District Court granted the motion. (App. H, I). Incredibly, once the present

action was filed, the Government consistently argued that the Court of Claims couldn't hear petitioner's claims either. (*See* Defendant's Post-Trial Brief at 8-11; Defendant's Brief in Support of its Motion for Summary Judgment at 5-10).

The Court of Claims' decision that petitioner should seek relief in the District Court rewards the Government's merry-go-round litigation tactics and ignores its own precedent of *Peerless Coal Co. v. United States, supra,* 215 Ct.Cl. 1045, 1046 (1978). Petitioner has been left in limbo, for there is nothing to indicate that it could ever get a hearing in the District Court on the merits of its objection to the Government's land acquisition strategy.

The gravamen of petitioner's claim is that the Government has in fact taken a greater interest in land than that acknowledged in its declaration of taking. But the District Court must follow the Ninth Circuit's decision that such a claim shall be heard in a Tucker Act suit in the Court of Claims (*United States v. 40.60 Acres of Land, Etc., supra,* 483 F.2d 927, 928 (9th Cir. 1973)), regardless of the Court of Claims' direction to petitioner. Moreover, the District Court long ago dismissed petitioner's affirmative defenses alleging both a taking of the fee and arbitrary and capricious (bad faith) selection of the land to be condemned. Petitioner's rights should not depend on the Court of Claims' speculation that the District Court might change its ruling and allow petitioner a forum for its claims.

Assuming that petitioner could secure a hearing in the District Court on the merits of its objections to the taking, the Court of Claims' decision would mandate a wasteful and counterproductive litigation exercise. The decision below tells the landowner that, where the Government in fact takes property for which it has not obtained an appropriation from Congress, the landowner may not obtain money com-

pensation but must instead seek to prevent or invalidate the taking itself. This approach would force unnecessary and nonsensical litigation in the many cases like the one at bench where the landowner does not challenge the legitimacy of the taking, only whether the Government has paid compensation for all that it has actually taken.

Moreover, the decision-making structure envisioned by the Court of Claims runs contrary to Congress' allocation of judicial responsibility. The condemnation court does not have authority to vary the estate described in the declaration of taking or to compel the Government to take and pay for some other estate. *Wilson v. United States*, 350 F.2d 901, 906 (10th Cir. 1965); *United States v. Brondum*, 272 F.2d 642, 646 (5th Cir. 1959); *United States v. 64.88 Acres of Land*, 244 F.2d 534, 536 (3d Cir. 1957). This limitation on authority allows the expeditious determination of condemnation actions, in which the only issue is the amount of compensation to be paid.

The decision below would turn this allocation of responsibilities on its head and would inject into the condemnation proceeding complex issues concerning what interest in land the agency has really acquired, what interest the agency really needs, and its motivation for making that determination of need. This problem would have substantial practical importance far beyond the present action, for the successive condemnation of term interests in land is a procedure the Government uses to maintain permanent control over other properties adjacent to March Air Force Base and at military bases around the country. (Defendant's Post-Trial Brief at 3-4; *Peerless Coal Co. v. United States, supra.*)

As in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 21 (1963), where this Court took action to correct a cumbersome and confusing set of procedures under the Jones Act, in the present case the Court should exercise its

power of supervision to prevent an ill-considered judicial innovation from confusing both condemnation proceedings and suits under the Tucker Act.

The Court should grant certiorari in order to exercise its power of supervision and clarify the proper forum for determination of the rights of petitioner and similarly situated property owners.

3. The Decision Below Raises Significant and Recurring Problems Regarding a Landowner's Remedies Against the Federal Government's Land Acquisition Practices.

The presently pending case of *San Diego Gas & Electric Co. v. City of San Diego* (No. 79-678, October Term, 1980), raises the question of whether a state may limit the remedies for a taking to mandamus and declaratory judgment designed to invalidate rather than compensate for the governmental action. The case at bench presents exactly the same issue with respect to federal courts' enforcement of the Fifth Amendment regarding the United States' actions.

The permanence of the Government's need to use petitioner's property as a safety and buffer zone (App. A, Findings 15-18, 22, 28, 71) dictates that petitioner will never be restored to the right to "possess, use and dispose of" its property. *See United States v. General Motors*, 323 U.S. 373, 378 (1945). Thus, the Government has in fact taken a fundamental element of petitioner's property rights. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). However, the decision below holds that, for want of proper authorization, this is not a *compensable* taking and indicates that petitioner's remedy is in the District Court by way of dismissal of the condemnation suit or injunction against the taking.

The Court of Claims' holding that a taking will not be compensable if the taking agency failed to utilize an available appropriation procedure squarely covers the typical inverse condemnation case, in which the agency has the power to condemn the interest actually taken but did not secure the funds. Thus, the practical effect of the Court of Claims' decision for Fifth Amendment taking cases involving the federal government is virtually the same as if it had, like the California courts, announced that money damages would not be available at all as a remedy for an uncompensated taking.

If this Court reverses the judgment below in *San Diego Gas & Electric Co.* and restores the vitality of money compensation as a remedy for a taking by a state agency, it must inevitably take the same approach in the case at bench. A reversal in *San Diego Gas & Electric Co.* that did not go hand in hand with a reversal in the present action would leave a serious discontinuity in the rights available under the Fifth and Fourteenth Amendments.

The Court should grant certiorari in order to resolve the significant and inevitably recurring problem of the scope of the landowner's remedies against the federal government's land acquisition practices.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

DATED: January 29, 1981.

Respectfully submitted,

PAUL J. HALL,
MANATT, PHELPS, ROTHENBERG
& TUNNEY,
1888 Century Park East,
Twenty-first Floor,
Los Angeles, Calif. 90067,
(213) 556-1500,
Counsel for Petitioner.

MARSHALL MANLEY,
FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG & MANLEY,
2029 Century Park East,
Suite 2600,
Los Angeles, Calif. 90067,
(213) 557-0111,
Of Counsel.

80-1296

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PAUL J. HALL,
MANATT, PHELPS, ROTHENBERG,
& TUNNEY,
1888 Century Park East,
Twenty-First Floor,
Los Angeles, Calif. 90067,
(213) 556-1500,
Counsel for Petitioner.

MARSHALL MANLEY,
FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG & MANLEY,
2029 Century Park East,
Suite 2600,
Los Angeles, Calif. 90067,
(213) 557-0111,
Of Counsel.

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APPENDIX A.

Opinion.

In the United States Court of Claims, Trial Division. No. 79-74.

(Filed: October 1, 1979).

Southern California Financial Corporation v. The United States. Taking; Inverse Condemnation; Successive Term Leaseholds.

Marshall Manley, attorney of record, for plaintiff. *Manatt, Phelps, Rothenberg & Tunney*, of counsel.

C. David Redmon, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

OPINION*

SCHWARTZ, *Trial Judge:* Plaintiff sues for an inverse condemnation of a tract of land adjoining that part of March Air Force Base, near Riverside, California, which is used as a bomb and ammunition storage area. The Government's motion for summary judgment was denied on December 20, 1974, and the case was remanded for trial. The case has been tried, and plaintiff is here held to prevail on the issue of liability. The amount of compensation remains to be determined.

From 1949 to 1961, the United States had possession of the tract as a tenant of plaintiff's predecessor, pursuant to non-exclusive leases for periods of a year or less, each lease extendible for four or five periods of a year. All the renewal options were exercised through 1961. In 1962, the owner declined to lease the land at the offered rental, and so the Government condemned a 6-months lease, extendible for

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*The opinion and conclusion of law are submitted together with accompanying findings of fact in accordance with rule 134(h). The necessary findings of fact are stated in the opinion.

periods of 1 year each. A similar condemnation took place in 1967.

Plaintiff bought the land in 1969. When the 1967 lease as extended expired in 1972, plaintiff would not agree to another lease, and asked that the Government buy the fee. The Government thereupon instituted another proceeding to condemn a lease of the same kind as before. A defense in the condemnation proceeding that the series of leases amounted to a condemnation of the fee, for which full payment ought to be made, was dismissed by the district court, on the Government's motion contending that such a defense could not be raised in the court in which condemnation proceedings were instituted.

The condemnation proceeding continued in the district court and culminated in a leasehold similar to those in the past, beginning in 1972. Plaintiff brought suit here in 1974 for an inverse condemnation of the fee, or more properly, of plaintiff's reversion. Another leasehold, similar to those in the past, was condemned in 1977, extendible until 1981.

I. Jurisdiction

A preliminary argument is that only the district court has jurisdiction. The Government having in the district court sought and obtained a ruling which left only this court with jurisdiction to award compensation as for the taking of a fee, that ruling is now the law of the case and the Government will not be heard to argue the contrary. *Peerless Coal Co. v. United States*, 215 Ct. Cl. 1045, 1046 (1978). *Cf. Nager Electric Co. v. United States*, 184 Ct. Cl. 390, 399-401, 396 F.2d 977, 981-83 (1968). At least one other district court, in granting a motion to strike a defense to condemnation of a lease on the ground of a taking of the fee valued at more than $10,000, has held that this court has exclusive jurisdiction of such claims. *United States v.*

1440.35 Acres of Land, 438 F. Supp. 1070, 1073-74 (D. Md. 1977). *Accord, United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53, 55-56 (9th Cir. 1968). The Supreme Court has often referred to the availability in the Court of Claims of the remedy of a suit for just compensation for an alleged unconventional, authorized taking. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974); *Malone v. Bowdoin*, 369 U.S. 643, 647, n.8 (1962).

II. The Claimed Taking

The plaintiff contends that it has suffered a taking of the fee by reason of valid governmental action which has deprived it of the economically reasonable use of the land. The contention is sustained, on these following facts.

The bomb and ammunition storage area of the March Air Force Base is located in its northwest corner. The tract in question, some 119.5 acres, abuts this corner on both the north and the west, and serves the base as a buffer or safety zone for the event of a possible explosion of the stored bombs and ammunition. It has appeared that March Air Force Base, one of the oldest and largest of its kind, will remain indefinitely a major air force base and that so long as bombs and ammunition are used, and stored as they presently are, the plaintiff's land will be needed as a buffer and safety zone. Further, it is agreed that there are no plans to change the place of bomb storage; the storage installation is a permanent one.

The basic 1-year term of the successive condemnations is no indication of any temporary character of the Government's need for the property. The duration of the leases is designed to conform to the 1-year availability of the relevant appropriations. The Government in fact plans to condemn

1-year leases into the indefinite future. This has been its intention, apparently, for many years. In sum, the Air Force uses the property as a permanent buffer zone and intends to use it as such indefinitely, and to pay for it by means of the 1-year rentals set in the condemnation proceedings.

While the leases are non-exclusive, and reserve to plaintiff the right to conduct agricultural operations, the land cannot be farmed with profit. Residential development and substantially all other use is forbidden under the terms of the leases; structures for "human habitation" may not be built or maintained, and gatherings of more than 25 persons are forbidden.

On trial, plaintiff made proof that the highest and best use of the land is to hold it for speculation for future development as a residential area. The speculative potential is somewhat dubious for a number of reasons, among them the noise of overflying planes, the proximity of the land to the ammunition dump and the restrictive zoning, under which residential development is not possible. But exact value aside, the fact remains that the use to which the Government puts the land, coupled with the intention to condemn an indefinite series of leases, deprives the plaintiff of the highest and best use of the land, and gives the Government an interest tantamount to a fee or a perpetual easement, without payment therefor.

The Government's motive is simply economy. The Air Force, recognizing that its need was permanent, has at times considered the relative cost of leasing and buying, concluded that leasing would be cheaper, and dropped the idea of acquisition of a fee. Moreover, it is administratively easier to pay the modest annual rent fixed in the condemnation proceedings than to obtain an appropriation of the money to pay for a fee or a permanent easement. Annual rents can be paid from a non-specific appropriation for maintenance.

Condemnation of the fee or a permanent easement, on the other hand, would require the Air Force to seek an appropriation in competition with all other capital improvements for which Congress must be asked for money. The reluctance to seek a large enough appropriation to pay for the interest actually taken is seen in the present record. A sophisticated commentator has suggested that such reluctance is found in other, similar cases. *See* H. Pittle, *Suits Against the United States For Taking Property Without Just Compensation,* 55 Geo. L.J. 631, 646 (1967).

The facts establish an inverse taking comparable to that found in *Benenson v. United States,* 212 Ct. Cl. 375, 548 F.2d 939 (1977), and *Drakes Bay Land Co. v. United States,* 191 Ct. Cl. 389, 424 F.2d 574 (1970). In those cases the court held that a taking took place where without "physical invasion or ouster" (*NBH Land Co. v. United States,* 217 Ct. Cl. ___, ___, 576 F.2d 317, 319 (1978)), the conduct of the Government has deprived the owner of any reasonable use of the property.

In *Benenson,* the conduct was primarily that of Congress. In the case of *Drakes Bay,* the conduct was that of the Executive Branch. While the conduct constituting the taking in those cases was far different from plaintiff's case, the decisions are much in point on principle. Perhaps more in point factually is *Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327, 329 (1922), where the infrequent shooting of cannon over plaintiff's hotel in peacetime, on an artillery practice range, was held to be " 'the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made.' " The threat of an ammunition explosion over the present plaintiff's land is as much an inhibition of use of the land as was the occasional cannon shot for the hotel on the island in Portsmouth harbor.

Details of the interference with use in the cases in federal[1] and state[2] courts which find a taking by deprivation of use, would serve no purpose, for each case is different from the others, and from this one. What is important is that the facts

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[1]The first and leading federal case on a taking by interference with use by flooding was *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871). The learning underlying the application of the flooding rule to the instant case is derived from the cases cited in the text, from *Pumpelly*, from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and from the following cases: *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Welch*, 217 U.S. 333 (1910); *United States v. Lynah*, 188 U.S. 445 (1903); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977); *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260 (N.D. Cal. 1978); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968); *Barnes v. United States*, 210 Ct. Cl. 467, 538 F.2d 865 (1976); *Pete v. United States*, 209 Ct. Cl. 270, 531 F.2d 1018 (1976); *Eyherabide v. United States*, 170 Ct. Cl. 598, 345 F.2d 565 (1965); *Bydlon v. United States*, 146 Ct. Cl. 764, 175 F. Supp. 891 (1959). *Cf.* 23 U.S.C. § 131(g) (just compensation for removal or prohibition of interstate highway billboards).

[2]*Behlman v. City of Florissant*, 548 S.W.2d 619 (Mo. App. 1977); *Washington Mkt. Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Grasso v. Bd. of Adjustment*, 137 N.J.L. 630, 61 A.2d 167 (1948); *Conroy-Prugh Glass Co. v. Pa. Dep't of Transp.*, 456 Pa. 384, 321 A.2d 598 (1974).

The California and New York courts follow a different rule by which an unlawful deprivation of all use by state or local regulation in the exercise of the police power is remediable not by an action for just compensation but by injunctive or declaratory relief. *See Agins v. City of Tiburon*, 24 Cal. 3d 266, 272-77, 598 P.2d 25, 28-31, 157 Cal. Rptr. 372, 375-78 (1979), time to appeal to U.S.Sup.Ct. extended to Oct. 12, 1979, Justice's Order of July 13, 1979, U.S.Sup.Ct.; *Charles v. Diamond*, 41 N.Y.2d 318, 329, 360 N.E.2d 1295, 1303, 392 N.Y.S.2d 594, 602-03 (1977); *Fred F. French Inv. Co. v. N.Y.*, 39 N.Y.2d 587, 593-95, 350 N.E.2d 381, 384-86, 385 N.Y.S.2d 5, 8-10 (1976).

Pointing in the other direction entirely—against any remedy—is the view which, in the interest of land-use and other types of regulation, emphasizes the permitted scope of the police power at the expense of the affected landowner's claim of an illegal taking. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Mugler v. Kansas*, 123 U.S. 623 (1887); F. Bosselman, D. Callies, J. Banta, *The Taking Issue* (G.P.O. 1973) *passim*. An interplay between regulation and taking is not present in the instant case, which involves a taking for the direct benefit of the Government itself, as proprietor.

of the present case satisfy the rule laid down, that property is taken when "the acts of the defendant have so impeded and restrained the plaintiffs as to deprive them of any reasonable use of their property." *Benenson v. United States,* 212 Ct. Cl. at 388, 548 F.2d at 947. *Accord, United States v. General Motors,* 323 U.S. 373, 378 (1945).

Plaintiff has been deprived of more than reasonable or profitable use. Plaintiff has been deprived of all use. All that is left in return is the annual rent. The Government's use is complete. It gets the benefit of a fee or a permanent easement, without paying for it. Full payment for the fee, actually taken and in use by the Government, is to be "deferred interminably." *Drakes Bay Land Co. v. United States,* 191 Ct. Cl. at 411, 424 F.2d at 586.

That the Government may not have intended to take the fee of the property is no matter. An explicit or deliberate intention to take is not necessary for a finding of taking; the intent may be implied from an act the natural consequence of which is to take. *Barnes v. United States,* 210 Ct. Cl. 467, 476, 538 F.2d 865, 871 (1976); *Eyherabide v. United States,* 170 Ct. Cl. 598, 601, 345 F.2d 565, 567 (1965).

The conclusion is that the acts of the Government in condemning term leases of the plaintiff's land for a public purpose—for use as a safety zone around a permanent ammunition dump—with the intention to continue to condemn such leases for the same purpose, into the indefinite future, so subordinate the land to the public use as to constitute a taking for which just compensation must be made. Whether the taking is that of the entire fee or, if the use reserved to plaintiff has some value, only an easement, may be settled in the proceedings to determine the value of what has been

taken. *Cf. United States v. Causby*, 328 U.S. 256, 267-68 (1946).

The result will not, despite the Government's protests, intrude on the Government's undoubted power to condemn terms for years. It is not here decided that the condemnee of a term or even successive terms for years may, without more, demand compensation for the entire fee. The decision here is only that successive condemnations of terms for years, coupled with a permanent need for the property and a fixed determination to continue condemnations indefinitely for the foreseeable future, amount to a taking of the fee or a permanent easement. No other decision is possible by the test of fairness, which, subjective as it may be, is the vital part of the Fifth Amendment command that property shall not be taken for public use without just compensation. *United States v. Fuller*, 409 U.S. 488, 490 (1973); *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923).

This conclusion makes it unnecessary to consider plaintiff's alternative contention that the Government acted in bad faith in condemning terms for years instead of a fee. In fairness to those concerned, however, it should be added that there is no evidence of such conspiracy or intent to injure the plaintiff as ordinarily would warrant a conclusion of bad faith. *Grasso v. United States*, Ct. Cl. No. 584-77, Order of September 9, 1978; *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 197-201, 543 F.2d 1298, 1301-03 (1976); *Gadsden v. United States*, 111 Ct. Cl. 487, 489-90, 78 F. Supp. 126, 127-128 (1948). The Air Force did all that it did with economy as its motive, and in the belief that its conduct was lawful. The error as to the law is not bad faith. The present decision is apparently one of first impression, and ignorance of the rule now laid down cannot be characterized as bad faith.

III. Authority

The defense that the taking is without authority is rejected. Authority there was in plenty, for the location of the ammunition dump at the corner of the base, for the decision that a buffer zone was needed and that it should encompass plaintiff's land, and for the successive condemnations to obtain the needed buffer zone. The net result was a taking of the fee.

There was as much authority for each of the acts constituting the taking as there was for the flooding in *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); for the airplane overflights in *Causby;* and for the cannon fire in *Portsmouth Harbor Land & Hotel Co.* The words of Mr. Justice Holmes in *Portsmouth* are apposite: "As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen." 260 U.S. at 330. *See also International Paper Co. v. United States,* 282 U.S. 399, 406 (1931); *Oro Fino Consolidated Mines, Inc. v. United States,* 118 Ct. Cl. 18, 22-23, 92 F. Supp. 1016, 1019 (1950), *cert. denied,* 341 U.S. 948 (1951).

NBH Land Co. v. United States, relied upon by the Government on the issue of authority, lays down no rule that authority to take inversely cannot be grounded on executive action. The conclusion there that authority was lacking was grounded on the deliberate rejection by Congress of the acquisition for which plaintiff sued. The court described *Benenson* and *Drakes Bay* as takings which were "a natural consequence of Congressionally approved measures." 217 Ct. Cl. at ___, 576 F.2d at 319. The present case is such a case. The authority to take follows from the authority of the Air Force to perform all the acts constituting the taking.

IV. The Defense of Limitations.

Lastly, the Government contends that the action accrued "prior to 1968," beyond the 6-year period of limitations provided in 28 U.S.C. § 2501. The precise date is not more closely fixed than by a loose reference to its occurrence during "the long history of successive renewals of one-year leaseholds, the continuing need for the property as a buffer zone for the munitions storage area, and the frequent refusals of the Government to purchase or exchange the property."

The cause of action for an inverse condemnation accrues not when the actual or physical taking occurs but when it is determinable by the plaintiff. Limitations do not run until the plaintiff knows or has reason to know both that his land has been taken and the extent of the taking. *Braude v. United States*, 218 Ct. Cl. .... , ... , 585 F.2d 1049, 1051-52 (1978); *Barnes v. United States*, 210 Ct. Cl. at 480, 538 F.2d at 873; *Castro v. United States*, 205 Ct. Cl. 534, 544-45, 500 F.2d 436, 440-41 (1974); *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634, 373 F.2d 356, 358-59 (1967), *cert. denied*, 389 U.S. 971 (1967). *Cf. United States v. Dickinson*, 331 U.S. 745, 749 (1947); *Oro Fino Consolidated Mines, Inc. v. United States*, 118 Ct. Cl. at 22, 92 F. Supp. at 1018. *But cf. Kabua v. United States*, 212 Ct. Cl. 160, 164-67, 546 F.2d 381, 383-85 (1976), *cert. denied*, 434 U.S. 821 (1977).

Until 1961 all that plaintiff and its predecessor could know was that the Government was leasing the land for periods of a year at a time, certainly little evidence of a condemnation of the fee. The first two eminent domain proceedings in 1962 and 1967 were not seriously contested by plaintiff's predecessor and added little to the evidence of the earlier voluntary leases. A condemnation of a lease, even leases, extendible for a total of 10 years, is not com-

pelling evidence of a permanent taking of the entire property. Besides, in the various condemnation proceedings the Government alleged that the estate to be taken was a renewable term for 1 year. It may be too much to say that the Government's intention was concealed. *Cf. Braude v. United States, supra.* But it is fair to say that the Government's allegations were representations and that plaintiff was entitled to rely on them until the contrary plainly appeared. Where there is uncertainty whether and how much the Government has taken, "it would be unfair if the statute had started running against plaintiff at a time when there was no way of knowing the duration of the interest taken." *Oro Fino Consolidated Mines Inc. v. United States,* 118 Ct. Cl. at 22, 92 F. Supp. at 1018.

Realization of the intention of the Government came only in 1973, in the course of the 1972 condemnation proceeding. At that time the attorney for the Government, in a conference in judicial chambers, advised plaintiff that "it was his understanding that the United States Government intended to continue to condemn the property which was the subject of the action continuously in the future in similar manner in which they had done in the past and that * * * they had no intention to release the property to the owners and * * * as far as they could determine, they would continue to condemn the property in the future ad infinitum."

Plaintiff was entitled to wait until it learned, from such an authoritative source and for the first itme, that the Air Force wanted and needed the property permanently, and planned to keep possession by the condemnation of successive leaseholds, indefinitely. Suit came soon thereafter in 1974, well within the 6 years allowed.

The intelligence from the Government's lawyer gave plaintiff to understand and grounds upon which to allege, for the first time, that the Government was actually intent

upon a taking of the entire use of the land. *Castro v. United States*, 205 Ct. Cl. at 544-45, 500 F.2d at 440-41. *Cf. United States v. Dickinson, supra,* (continuous flooding; held, plaintiff entitled to postpone suit "until the consequences of inundation have so manifested themselves that a final account may be struck"); *Oro Fino Consolidated Mines, Inc. v. United States*, 118 Ct. Cl. at 21, 92 F. Supp. at 1018 (wartime governmental closing of gold mines; held, cause of action accrued on reopening of mine, when duration of taking became known).

The time of accrual of the cause of action is often difficult to determine. The fixing of the exact date of taking must often be done in the intuitive manner in which a jury reaches its verdict. *Drakes Bay Land Co. v. United States*, 191 Ct. Cl. at 414, 424 F.2d at 587; *Barnes v. United States*, 210 Ct. Cl. at 480, 536 F.2d at 873. The date is here fixed at 1973, on the available evidence. The conclusion is confirmed by the Supreme Court's caution not to deny the constitutional guarantee of just compensation by an overrestrictive setting of a date of taking. *United States v. Dickinson, supra.*

Accordingly, it is adjudged that an authorized inverse condemnation of the plaintiff's tract of land took place in 1973, within the period of limitations, and that plaintiff is entitled to just compensation, upon the delivery to defendant of an appropriate deed, the amount of compensation and the nature of the interest to be conveyed by the deed to be determined in further proceedings in accordance with rule 131(c).

Findings of Fact

1. This action for inverse condemnation was instituted on March 18, 1974. The property which is the subject of the case is on the map of the March Air Force Base known

as Tract D-496-2 and on the topographic Geological Survey map Riverside East, Calif., included in Tract 17. It contains 119.5 acres of land, more or less. It has been owned in fee simple by plaintiff Southern California Financial Corporation since September 12, 1969, and it is part of a larger parcel owned by plaintiff. County land-use maps and March AFB maps show the subject property as part of the Base.

Voluntary Leases of the Property, 1949-1962

2. (a) The subject property abuts the northwest corner of the March Air Force Base, Riverside, California. The bomb and ammunition storage area of the Base is located in that corner.

(b) In order to secure a buffer zone of vacant land around the bomb and ammunition storage facility of the Base, the defendant leased the subject property from the then owners, known as the Trautwein Group, together with adjacent parcels, for a term of 1 year effective October 1, 1949. The lease provided that the lessor retained joint use of the property, for agricultural purposes only.

(c) Thereafter, the defendant leased the subject property from the Trautwein Group, together with various adjacent parcels, through an unbroken series of similar, 1-year leases which extended through and included December 31, 1961.

3. On or about September 12, 1969, plaintiff purchased the subject property from the Trautwein Group as part of a larger transaction which included purchase of approximately 6,200 acres for a total consideration of approximately $9,000,000.

4. In or about the fall of 1961, the Trautwein Group and the defendant failed to reach agreement on a renewal lease because the Group would not accept the amount of

rent offered by the defendant. Upon rejection of its final offer, the defendant took the steps described in the following finding.

Condemnation of 1-Year Leases, 1962—to Date.

5. (a) On February 27, 1962, the United States filed in the U.S. District Court for the Southern District of California, Central Division, Civil Action No. 62-338-S, entitled *United States of America v. 239.82 Acres of Land,* to condemn successive leaseholds in the subject property and in several adjacent parcels.

(b) As authority for the condemnation the complaint stated that:

> The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes; the Act of Congress approved August 17, 1961 (Public Law 87-144), which act authorized the acquisition and appropriated funds for such purposes.

(c) The complaint and the declaration of taking provided for a lease for 6 months, extendible for five periods of 1 year each at the election of the United States, as follows:

> The estate taken for said public uses is a non-exclusive term for years beginning January 1, 1962 and ending June 30, 1962, extendible for yearly periods thereafter at the election of the United States until June 30, 1967, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a

reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore placed thereon by or for the United States; reserving to the lessors, their heirs, executors, administrators and assigns the right to cultivate the land for any and all crops which may be grown thereon; provided, however, that no structures for human habitation shall be constructed and maintained on the land; provided, further, that no gathering of more than twenty-five persons shall be permitted thereon; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

6. In the succeeding 5 years the defendant exercised each of its 1-year renewal options and thus retained possession of the subject property through and including June 30, 1967.

7. In 1967, the Trautwein Group rejected as insufficient the defendant's final offer of compensation for a voluntary lease of the subject property for the period following June 30, 1967, and the defendant again elected to condemn the property for a similar term.

8. (a) On June 30, 1967, the defendant filed in the U.S. District Court, Central District of California, Civil Action No. 67-923-PH, entitled *United States of America v. 219.23 Acres of Land*, in order to condemn the subject property and several adjacent parcels.

(b) As authority, the complaint in condemnation stated that:

> The authority for the taking is the Act of Congress approved August 1, 1888 (25 Stat. 356, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes; funds for the payment of rental for the term beginning July 1, 1967, and ending June 30, 1968,

> will be made available from the Department of Defense Appropriation Act of 1968 when enacted into law.

(c) The complaint in condemnation and the declaration of taking described as taken for public use the same estate which had been taken in the 1962 condemnation action. The term of the taking was described as follows:

> The estate taken for said public uses is a nonexclusive term for years beginning July 1, 1967, and ending June 30, 1968, extendible for yearly periods thereafter at the election of the United States until June 30, 1972 * * *.

9. (a) In the succeeding 4 years the defendant exercised each of its 1-year renewal options and thereby continued uninterrupted possession of the property through and including June 30, 1972.

(b) The elections for the first of the 4 years took place prior to plaintiff's purchase of the property. Plaintiff bought the property during the lease year ending June 30, 1970, the second of the 4 renewal years. Thereafter the defendant made similar elections for the years June 30, 1971 and June 30, 1972. Plaintiff received compensation for the defendant's possession during the period of plaintiff's ownership.

10. (a) On June 30, 1972, the defendant again exercised its power of eminent domain to take the subject property and some adjacent parcels by instituting in the U.S. District Court, Central District of California, Civil Action No. 72-1505-JWC, entitled *United States of America v. 214.69 Acres of Land*.

(b) The complaint in condemnation invoked the authorities cited in the complaint in 1962, substituting for the 1961 appropriation act an expected appropriation act for 1973.

(c) The complaint and the declaration of taking further described as taken the same estate as that taken in the 1962 and 1967 condemnation actions.

11. In the succeeding 4 years, the defendant exercised its options to renew the lease for successive 1-year terms and thereby continued uninterrupted possession of the property through and including March 31, 1977.

12. On March 8, 1978, the defendant again exercised its power of eminent domain to take the subject property and some adjacent parcels by instituting in the U.S. District Court, Central District of California, Civil Action No. 78-0890-WPG, entitled *United States of America v. 214.69 Acres of Land*. The complaint again invoked the authorities cited in the prior actions, substituting for earlier appropriation acts a 1976 appropriation act. The term of the taking was described as from April 1, 1977, and ending March 31, 1978, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1981.

13. The defendant moved for and obtained an order confirming its right to continued possession of the subject property effective April 1, 1977, and the defendant elected to extend the term of its possession from April 1, 1978 to March 31, 1979.

14. The defendant has continued in uninterrupted possession of the subject property by means of successive condemnations, as described above, from February 27, 1962, to the present.

15. The subject property has at all times pertinent been acquired and used by the defendant for the public purpose of providing a necessary buffer/safety zone adjacent to the bomb and ammunition storage area of March Air Force Base.

16. The bomb and ammunition storage area at the Base is located on land owned in fee simple by the United States, and all construction in that area since 1955 has been of a permanent type.

17. Since no later than 1953, the intended use and anticipated need for the subject property as a part of March Air Force Base has not changed. As of 1953, and continuing to the present, the defendant has had a need for the property for an indefinite term contingent upon the existence of an ammunition storage area in its present location.

18. March Air Force Base is now and will be for the foreseeable future a major military installation of the U.S. Air Force. So long as ammunition storage areas are necessary to its function, a buffer zone surrounding the storage area will be required. There are no plans to discontinue the use or location of the existing ammunition storage facility.

The United States thus has a permanent need for the subject property.

Government Consideration of Acquisition of a Fee, 1953-63.

19. In 1953, and at several times prior to 1969, the defendant studied the feasibility of acquiring either a permanent restrictive easement or a fee interest in the subject property and adjacent lands. In each case, the decision was made to continue acquisition of 1-year renewable term interests.

20. In a letter dated June 29, 1956, from the Chief Staff, by George A. Lavallee, Chief, Realty Operations Section, to the Commander-In-Chief, Strategic Air Command, Offutt Air Force Base, Omaha, Nebraska, the Chief of Staff stated:

> In reviewing the above mentioned report, it appears that the 1,851 acres presently under lease in connection

with the ammunition storage area at that installation [March Air Force Base] are a permanent requirement and that the possibilities of acquiring a more permanent interest in the property should be explored due to its location in relation to the main installation.

21. By memorandum dated on or about July 17, 1956, the Headquarters, Strategic Air Command, Offutt Air Force Base, Omaha, Nebraska, directed the Commander, 15th Air Force, March Air Force Base, California, as follows:

1. It is requested that a study be made to determine the advisability of acquiring a more permanent real estate interest in the 1,851 acres comprising the March Air Force Base Ammunition Storage Annex, which area is presently under lease to the government.

2. Your comments and recommendations in this regard are requested. If it appears to the best interest of the government to acquire fee title to this area, this headquarters will request the Corps of Engineers to prepare a revised real estate planning report and take action to include a land acquisition fee line item in a future military construction program.

22. Thereafter, at a date not shown in the record, the Commander-in-Chief, SAC, directed the District Engineer, Los Angeles District, P.O. Box 17277, Los Angeles, California, as follows:

1. Request that a Real Estate Requirements Estimate [for Fiscal Year 1960 Military Construction Program] be prepared to cover fee acquisition of land and restrictive easement acquisition over land required to satisfy quantity safety distance criteria for the existing ammunition storage facilities at March Air Force Base.

23. As of November 14, 1958, the Air Force stated in the Fiscal Year 1960 Military Construction Program a plan to acquire permanent rights in the subject property to replace

the leasehold of the subject property and other related leaseholds.

24. In 1963, at one stage of the planning of the Fiscal Year 1965 Military Construction Program, there was included a cost study for acquisition of permanent land interests in the buffer zone around the March AFB bomb and ammunition storage area.

Abandonment of Consideration of Acquisition of a Fee, 1963

25. Outright acquisition of these land interests was, however, deleted from the Program in or about June 1963, on the ground that leasehold interests were more economical.

26. On April 2, 1963, Floyd D. Bender, Deputy Civil Engineer, March Air Force Base, reported to the 15th Air Force that:

> 2. Based on advice furnished by Headquarters SAC on the reduction of required space for a demolition disposal area, a cost comparison to acquire these land areas versus leasing has been accomplished with the following results:
>
> a. Total cost to acquire land areas, as indicated below: $95,751.00.
>
> | | |
> |---|---|
> | Restrictive Easement | 610.53 AC |
> | R/W Road to Ammo Area | 3.00 AC |
> | R/W Road to Demolition Area | 1.72 AC |
> | Fee-Demolition Area | 5.55 AC |
> | TOTAL | 620.80 AC |
>
> b. Total annual costs to lease
>
> | | |
> |---|---|
> | on a joint use basis | 615.25 AC |
> | and exclusive use | 5.55 AC |
> | TOTAL | 620.80 AC |
>
> $4,054.63

27. On or about April 12, 1963, the Commander, March Air Force Base, by Clare H. Royce, Lt. Col., USAF, and Chief, Base Development Division, Directorate of Civil Engineering, reported to SAC that:

> 2. A cost comparison survey to acquire the permanent land interests recommended by your headquarters, in lieu of land interests requested by this headquarters in the FY 65 Military Construction Program, has been accomplished. The cost to acquire these reduced land interests, compared to leasing this land on a joint-use basis, reveals it is not economically feasible to purchase permanent interests. This survey shows that it will take 23½ years to amortize the cost of permanent acquisition, based on the cost to lease this land on a joint-use basis.
>
> * * * * *
>
> 4. In view of the above, request subject land items be deleted from the FY 65 Military Construction Program.

28. Thereafter, in June 1963, Headquarters, SAC, Omaha, reported to Headquarters, USAF, concerning the relative costs of acquiring temporary and permanent interests in a total of 620.80 acres, including the subject property. It was estimated that the annual expense for leasing the lands comprising the safety/distance area around the March Air Force Base Ammunition Storage Area on a joint-use basis would be approximately $4,050.00. Comparatively, it was estimated that the cost of acquiring a restrictive easement over the 620.80 acres needed would be $93,120.00. The study concluded that:

> 4. In view of the above, we consider that it is more economical to lease all lands comprising the March Ammo Safety Area on a joint-use basis, with landowners' operations limited to agriculture and grazing.
> * * *

* * * * *

6. Land items referred to in paragraph 4 of preceding 1st Indorsement have been deleted from the FY 1965 Military Construction Program.

29. On June 11, 1963, the Chief of Staff, USAF, by Donald L. Black, Deputy Chief, Air Force Real Estate Agency, Director of Civil Engineering, reported to Headquarters, SAC, that:

> Concur in your recommendation that the requirement for a restricted area around the March Air Force Base Ammunition Storage Area be met by leasing the required restrictions only, and therefore, allowing limited joint use of the land involved.

30. The basis for the 1963 decision to continue leasing the land required for the March Air Force Base Bomb and Ammunition Storage Area buffer zone on a joint-use basis rather than acquire permanent interests in that land was that leasing was more economical for the United States. As one witness, an Air Force lawyer, put it, "leasing was regarded as, to put it accurately, a better deal for the Government than purchase."

The 1967 Condemnation—The Decision Not to Acquire a Fee

31. On or about March 29, 1967, during the precondemnation negotiations for acquisition of a leasehold on the subject property from the Trautwein family, the owner's attorney informed the negotiator for the Corps of Engineers that the owner's expenses for taxes and water assessments on the subject property exceeded the annual rental of $1,120 offered by the United States.

32. (a) On about April 5, 1967, an appraisal report on the subject property, prepared by the Corps of Engineers, U.S. Army Engineer District, Los Angeles, California,

stated the fair rental value of the subject property on a joint-use basis as $1,120 per annum.

(b) The report also appraised the fair market value of the property at $255,156, and stated that "[t]he present value of the land is for speculation and not immediate development."

(c) The report further acknowledged that the acquisition of the proposed restrictive easement "will affect the liquidity of the property in event a sale were contemplated."

33. The defendant did not raise its offer for annual rental of the subject property above $1,120 and by report dated August 3, 1967, the Corps of Engineers' negotiator recommended that a declaration of taking should be filed without further delay.

34. (a) In about October 1967, the Office of the Secretary of the Air Force, by Louis E. Turner, Deputy Assistant Secretary (Installations), requested an investigation of the economic feasibility of acquiring perpetual easements in the 219.23 acre buffer zone adjacent to March AFB. In response to this request, Headquarters, SAC, requested that the Corps of Engineers, District Engineer, Los Angeles District, investigate the economic feasibility of acquiring perpetual restrictive easements for the March AFB Ammo Storage Area and, for comparison purposes, to include the estimated cost of fee purchase of these land areas.

(b) The decision, however, was not to acquire the fee or a perpetual easement but to condemn a lease, as before.

(c) The decision was made for the reasons (1) that it was less expensive to lease than to purchase, and (2) that the purchase of the subject property had not been authorized in that year's Military Construction Authorization Act.

35. (a) Air Force acquisitions of interests in land with a value in excess of $50,000 must be approved under the annual Military Construction Authorization Act. Authorization for a purchase of an interest in land in excess of $50,000 for March Air Force Base would require the approval of the intermediate command, the 15th Air Force; the SAC; the Director of Civil Engineering, Headquarters, USAF; the Deputy Chief of Staff for Programs and Resources and the Air Force Council; the Office of the Secretary of the Air Force, specifically the Deputy Assistant Secretary for Installations; the Office of the Secretary of Defense; the Office of Management and Budget; the Budget of the President of the United States; and, ultimately, Congressional authorization through the annual Military Construction Appropriations Act.

(b) Processing a request through the procedure of the Military Construction Program requires, at a minimum, approximately 1 year. When the determination had to be made as to whether to continue the condemnation of a leasehold in the subject property that had begun in 1962, it was already too late to include an appropriation for purchase of the subject property in the 1967 Military Construction Program. For instance, a July 1967 purchase request could not result in authorization for funding to purchase before July 1968.

36. Air Force acquisition of any interest in land that has a cost of under $50,000 can be handled as a minor land acquisition funded from the annual operation and maintenance program, and such an acquisition under $50,000 does not require authorization under a Military Construction Program.

37. In reaching the decision in 1967 to condemn successive 1-year leasehold interests in the subject property, the Air Force considered that the expected use of the subject

property would exceed a 5-year period. The technique of condemning a 1-year leasehold renewable for a 5-year period was chosen because leaseholds are funded under annual funds which cannot be used to enter into an obligation for longer than 1 year. This procedure allowed acquisition of the subject property without involvement in the annual Military Construction Program.

The 1972 Condemnation—No Consideration of Acquisition of a Fee

38. In 1972, when the Department of the Air Force decided to institute another 5-year condemnation of a lease of the subject property, the issues that were discussed in 1967 (including whether to lease or to buy) were not reraised, and the condemnation action was processed routinely.

The Contested 1972 Condemnation

39. (a) On July 20, 1972, the United States served the Notice of Filing Complaint in Condemnation and related documents in Civil Action No. 72-1505-JWC on Peter F. McAndrews, plaintiff's secretary and legal counsel, whose duties included general supervision of the legal affairs of the company. At the same time, the defendant also forwarded to plaintiff a proposed Notice of Appearance in a franked return envelope.

(b) Plaintiff served and filed a Notice of Appearance on July 26, 1972.

40. At the time plaintiff filed the Notice of Appearance, its counsel did not know the specific location of the subject property, and Mr. McAndrews asked the Assistant U.S. Attorney handling the case for assistance in locating the property. Plaintiff's counsel had not previously directed his attention to the property, nor had he had any discussion with

other officers of the plaintiff regarding any legal action to be taken with respect to the property.

41. On July 31, 1972, following telephone communications, plaintiff requested that the defendant enter into negotiations to arrange for a sale to the Government or have a condemnation in the traditional and more normal sense of the word.

42. Plaintiff's request that the United States either purchase or condemn a fee interest in the subject property had not been formulated before receipt of the 1972 complaint in condemnation.

43. By letter of October 12, 1972, plaintiff requested that the United States state whether "there [is] any possibility of an outright purchase of the property by the Government or the exchange of the property for other land now owned by the Government in the area."

44. In a letter of November 15, 1972, Assistant U.S. Attorney Bryan N. Freeman responded in the negative as follows:

> This is in response to your letter dated October 12, 1972, wherein you inquired as to the possibility either of a purchase of the above-referenced tract by the Government or the exchange of the property for other land owned by the Government.
>
> The Army Corps of Engineers, Los Angeles District, has informed us that requests for an outright purchase or an exchange of the tracts occupied by the Air Force under lease or leasehold condemnation have been instituted on frequent occasions both by the former owners of Tract D-496-2 and other landowners similarly situated, at least as far back as 1967. In each instance the response of the Air Force to these inquiries has been in the negative on the ground that the proposals were not militarily feasible.

* * * * *

The Corps further pointed out that there is always the possibility that at some future date the Air Force could determine the lands under lease to be excess to its military requirements in which case they would be released to the owners.

45. Following receipt of Mr. Freeman's letter of November 15, 1972, Mr. McAndrews turned the matter over to outside counsel, Mr. Marshall Manley.

46. The Notice of Appearance previously filed in Civil Action No. 72-1505-JWC by Mr. McAndrews limited plaintiff's rights to litigation of the question of valuation of the subject property. Upon appearing in the action, Mr. Manley made a motion for an order permitting plaintiff to file an answer. The motion was granted, after an opposition by the Government in which it was said that "The Estate Taken is a Temporary Interest by the Terms of the Taking."

47. (a) In early 1973, after the hearing on plaintiff's motion for leave to file an answer, Mr. Manley attended a status conference in the chambers of Judge Jesse Curtis. There a representative of the Department of Justice stated that "it was his understanding that the United States government intended to continue to condemn the property which was the subject of the action continuously in the future in similar manner in which they had done in the past and that * * * they had no intention to release the property to the owners and * * * as far as they could determine, they would continue to condemn the property in the future ad infinitum."

(b) This statement was Mr. Manley's first notice from a representative of the United States that the United States intended to condemn the subject property for the indefinite future.

48. (a) After filing of plaintiff's answer to the complaint in condemnation, the Government moved to strike plaintiff's affirmative defenses. Among the grounds, as stated in the captions of points 2 and 4 of the argument, respectively, were that "The Estate Taken Is a Temporary Interest By the Terms of the Taking" and that "The Defendant May Not Challenge the Estate Taken in This Proceeding [in the district court]."

(b) Thereafter, plaintiff filed a notice of non-opposition to the motion to strike answer. The notice reserved plaintiff's right to pursue the issues raised in its answer in the United States Court of Claims.

(c) The district court on June 15, 1973, granted the United States' motion to strike portions of plaintiff's answer; and this action was on March 18, 1974, filed in this court.

Plaintiff's Agricultural Expert: The Property Is Not Suited for Agriculture

49. Plaintiff's expert witness, Mr. Sherman G. Babcock, is an expert agricultural consultant who is familiar with soils, agricultural development in the Riverside area and the costs of conducting agricultural operations in that area.

50. He testified to his opinion that the subject property is not economically suitable for the conduct of any agricultural operations.

51. His opinion was in part based on the following facts and considerations:

(a) The soil types on the property range from "not suited to agriculture" to "severe limitations for agriculture."

(b) There is no agricultural water available.

(c) There is presently a crop of barley being dry-farmed on the property, *i.e.*, using rainfall water.

(d) Even excluding consideration of return on investment in the land, dry farming barley on the subject property would produce a loss.

(e) There is no crop that may be dry farmed that would be more profitable than barley for farming on the subject property.

(f) Citrus culture is technically possible on the subject property with "foreign water," and citrus culture has been practiced on adjacent land. Citrus culture would produce an even greater loss than dry farming of barley.

52. (a) From and after 1975, plaintiff has not been a party to any agricultural lease for the property, and it does not receive any remuneration from the person who is presently growing barley on the subject property.

(b) The reason plaintiff has not entered into an agricultural lease for the property is that the amount of rental offered by the prospective lessee, $5.00 per acre per year, would not compensate plaintiff for the administrative costs attendant to such a lease and because plaintiff does not wish the property to be encumbered by the financing statement that is frequently filed as a consequence of a farmer's commercial borrowing.

(c) Plaintiff has not evicted the person who is growing barley on the subject property because the farming operation abates the growth of weeds and tends to prevent people from dumping refuse on the subject property.

Plaintiff's Appraiser: The Highest & Best Possible Use Is to Hold for Speculation With Ultimate Development Into 1-Acre Residential Lots

53. Plaintiff's witness, Mr. Raynor J. Klaris, is an expert real estate appraiser with experience in analysis of undeveloped land and agricultural and grazing properties.

54. His opinion is that, while the subject property is not suitable for immediate residential development, it is economically suitable for eventual development into 1-acre residential lots and that at the present time the economically feasible best use for the subject property is to hold for speculation with ultimate development into 1-acre residential lots.

55. His opinion is based on the assumption that (a) a zoning change from 20-acre to 1-acre residential sites can be eventually obtained from the local government; (b) that the property was not restricted by a safety hazard presented by reason of proximity to the March AFB bomb and ammunition storage area and the existing condemnation by defendant.

56. He testified that:

(a) In analyzing the potential highest and best use of undeveloped property, appropriate procedure for an expert real estate appraiser is to make the basic assumption that the property is not restricted by zoning and then determine what the highest and best use of the property would be based upon the character and development of the area.

(b) After the real estate appraiser has determined the potential highest and best use of undeveloped property, the owner implements or attempts to implement that change in the use of that property. It does not make sense to seek a zone change before one knows whether or not the contemplated zone change would make a given parcel of property economically useful.

(c) Under the circumstances of this case. "there would be no point * * * in going through a development plan for the subject property with this [condemnation] restriction on the property, and potentially on the property in perpetuity."

57. The bases for his opinion as to highest and best possible use are the following facts and considerations:

(a) The property lies to the west of Interstate 15 and is near Alessandro Blvd. on the north, Trautwein Road on the west and Van Buren Blvd. on the south. An easement for Barton Road, which runs south to Van Buren Blvd., lies at the eastern edge of the subject property, and an easement for John F. Kennedy Road runs across the southern part of the subject property.

(b) The property is located in the community of Woodcrest, in an unincorporated area of the western portion of Riverside County, and lies to the southeast of the central urban area of the City of Riverside, and to the west of March AFB.

(c) The Riverside County General Plan mistakenly includes the property as part of the March AFB. The property is shown to be surrounded by two types of land-use classifications: (1) Agricultural Reserve, and (2) Open Space and Other Agricultural Lands. While the Board of Supervisors would have no zoning jurisdiction if the property was actually part of March AFB, it is not. The subject property is zoned R-A-20, which requires 20-acre lot sites.

(d) The subject property is currently zoned R-A-20, which indicates Residential Agricultural with a minimum lot size of 20 acres. One-acre residential lots would not be permitted on the subject property under existing zoning.

(e) A zone change from R-A-20 to 1-acre residential lots would require an amendment to the Riverside County General Plan.

(f) While there is no agricultural water available for the subject property, residential water or domestic water is available from the Western Municipal Water District.

(g) The subject property does not have access to sewers. Septic tanks and leach lines with minimum 1-acre lot size are the typical means of sewage disposal for individual residences in the area.

(h) The total value of building permits issued for Riverside County increased by 91.5 percent from 1976 to 1977, and the unincorporated areas of the County showed a 78.5 percent increase in the value of building permits issued during the same period.

(i) The City of Riverside imposed a moratorium on building of new single-family homes from November 1977 to October 1978, which caused demand for housing to shift to surrounding areas. The value of building permits in unincorporated areas of Riverside County was up 64 percent in January of 1978, during which time there was very little building activity in the City of Riverside.

(j) Since the early 1960's the Riverside area has become increasingly urbanized, and agriculture is being deemphasized. Agricultural acreage in Riverside County decreased by 3.2 percent from 1974 to 1977. The tax rate and the rising cost of agricultural water have created a situation where "[t]he continued increase in operating costs encourage or even force the agricultural property owner to convert his property from agriculture to an urban use."

(k) As evidenced from the development and growth which have taken place within the general area, there is an apparent gradual trend or transformation of rural land to urban type use. The slow growth pattern is extending toward the subject area from both the developed portion of Woodcrest on the west and from the City of Riverside on the northwest.

(l) The nearest development to subject property is in an area which almost abuts the northeast corner of the

property. This development dates from the late 1960's and consists of a trailer park on the eastern portion and 1-half acre lots on the western portion. Several of the lots which had been vacant until a year ago now contain homes because of the increased demand for housing.

(m) There is currently being developed a section of the county about 1 mile north, northwest of subject property. There are 12 to 15 homes, on 1 to 2½-acre sites completed, with three under construction. The developer has 60 additional acres which he is trying to get the county to rezone to 1-acre building sites. This county area is similar to subject property in most respects, with the exception of proximity to March AFB.

(n) The typical residential development in the Woodcrest area is large, ranch-type parcels, typically on 1 to 2½-acre lots.

Defendant's Land Use Expert: Residential Development Is Unlikely for a Variety of Stated Reasons

58. (a) Defendant's witness, Mr. Richard J. Smith, is an expert by education and training in the field of land-use planning, zoning, state and local land-use regulation and development trends in Riverside County.

(b) His opinion is that plaintiff's land is unsuitable and undesirable for residential development, now or in the future.

59. His opinion is based on the following facts and considerations:

(a) Holding real property for speculation entails a business judgment that the short-term losses incurred in holding property that has a negative income flow are justified by the expectation of future profits to be derived from the development of that real property.

(b) That portion of section 17 (which section includes the subject property) that is not subject to condemnation by the United States has value for holding for speculative purposes.

(c) Given the presently existing condemnation by the United States, an expert real estate appraiser would not advise a client to incur the expense of a plan of development for the subject property.

(d) The Riverside County General Plan and present zoning preclude plaintiff's property from being used for 1-acre residential lots.

(e) The Riverside County General Plan could be amended to allow residential development on plaintiff's land only after an environmental assessment is prepared by the county, pursuant to the California Environmental Quality Act. Such environmental assessment would be a very important factor in the determination as to whether the General Plan should be amended. The assessment would confirm all the adverse effects of noise, the ammunition storage area, leap-frog development and the inconsistency of an amendment with open space and conservation policies.

60. (a) The witness analyzed a recent attempt to amend the General Plan for property, similar to that of plaintiff, which would have allowed low density residential development. The amendment was denied by the Board of Supervisors of Riverside County in June 1977, on the basis of reports recommending denial from the County Airport Land Use Commission, the Environmental Impact group and the Riverside Planning Commission.

(b) The desired maximum noise levels adopted by the County Board of Supervisors in October 1975, for the desired type of low density development was 60 dbl.dn. The subject property was in an area tested at 65 to 75 dbl.dn

noise levels, which was found to be unacceptable to persons residing in the vicinity of the airport. Noise levels at the subject property in suit are in the area of 70 to 75 dbl.dn.

(c) The noise level of the subject property was considered to be somewhat higher than the laboratory-tested noise levels since it is about 150 feet higher than runway elevation.

(d) The similar property lies under the flight pattern of March AFB, which could not be changed without adversely affecting existing residents or flying safety. The subject property is also located under the flight patterns of March AFB.

(e) Soils at the similar location severely limit septic tank use, and the location might have detrimental effects on wildlife in the reserve south of the site. Plaintiff's site location contains no evidence of these limitations, but it has not been tested for these possibilities.

61. One of the unsuitable aspects of subject property for low density residential development is that noise levels on this property of 70 to 75 dbl.dn exceed the desired maximum adopted by the Riverside County Planning Commission in October 1975. Because of these noise levels Federal Mortgage Insurance would not be available, if desired, for possible low cost development requiring such a subsidy. Federal housing standards would require expensive building improvements which would reduce noise levels by 30 decibels.

62. Another aspect of plaintiff's property that indicates its undesirability for residential development is its proximity to the March Air Force Base and the ammunition storage facility. The safety considerations and the outward appearance of the facility with its bunkers, large tower and barbed

wire fences make residential development less than desirable.

63. Plaintiff's property would not be an ideal property to zone for residential development because this would require altering the open space and conservation element of Riverside County's General Plan. Such an alteration would be contrary to the desires of the local population which wishes to keep the present open space and agricultural character.

64. Residential development on plaintiff's property at this time would constitute a "leap frog" effect whereby the development in this remote area would require the expensive extensions of streets, sewers and other services, even though there is an abundance of vacant land more ideally located for such development.

Agreement That the Property Is Not Suitable for Immediate Residential Development

65. Both parties agree the subject property is not suitable for immediate residential development.

Defendant's Appraiser: Assuming Defendant's Easement Is Temporary, Highest and Best Possible Use Is Speculative for Future Development

66. Defendant's witness, Mr. Robert G. Hill, is by education and experience an expert appraiser of real estate, land development patterns, and the real estate market in Riverside County, California. His research for this suit included consultation with the Riverside County Assessor, real estate brokers, planners and planning consultants. He has personal experience in real estate speculation and investment.

67. His opinion is that, assuming that defendant's easement were only temporary, the highest and best use of the

subject property is holding for speculation on future development.

68. The bases for his opinion are the following facts and considerations:

(a) The subject property, comprising 119 acres, is generally undulating, with numerous outcroppings of rock and large boulders and washes. It has historically been planted in barley, or grazed. It is now planted in barley.

(b) The 500-acre unencumbered tract owned by plaintiff is zoned R-A-20, as is the subject property, but has not been developed in any way by plaintiff since its purchase in 1969.

(c) Development potential for the subject property is directly affected by the economic influences of Riverside County and March AFB, zoning and other legal restrictions, availability of utilities, environmental controls, the proximity of the March AFB ammunition storage dump and flight operations.

(d) There is substantial commercial and residential development presently to the east and northeast of March AFB in the Sunnymead and Edgemont areas. Plaintiff had developed some of these areas for residential and recreational use.

(e) Unlike the immediate vicinity of the subject property, the Edgemont and Sunnymead areas are developing, in part, because they are near established commercial centers, are not severely influenced by noise from March AFB and are not near an ammunition storage agea.

(f) Market demand for commercial or residential development of the subject property and the surrounding area is very unlikely to arise within the next 5 years. One cannot be specific, but such a demand is more likely in the 5-10 year period.

69. (a) In reaching his opinion of the highest and best use and development potential of the subject property, defendant's expert appraiser researched and evaluated 22 land transactions in the general area.

(b) During the period 1966-78 and continuing to the present, the land sales market in the subject area has been uniformly speculative. Most of the tracts have changed hands twice or more during the period. Foreclosure actions were filed on 11 of the 22 tracts and deeds in lieu of foreclosure were given by the buyers of several other tracts. There is a trend of residential development down along Alessandro Blvd., from the City of Riverside, toward the subject property.

(c) Of these properties, those on the north, or opposite, side of Alessandro Blvd. are more suitable for eventual development than the subject property. They are more appropriately zoned, have better access, are within the Riverside City limits and are not near the ammunition storage area.

(d) Two of the sales of comparable properties were made by plaintiff and within 2 years were foreclosed upon by plaintiff when the buyer defaulted.

(e) The real estate market in the vicinity of the subject property has since 1967 remained highly speculative. Most properties were sold with small down payments. Typically, buyers soon realized that the anticipated market for development would not materialize in the near future. Most grew disenchanted with their purchases and allowed the title to revert to the seller, either by deed or foreclosure.

Intermediate Conclusions of Law and Fact

70. The highest and best possible use of plaintiff's land is to hold it for speculation for future residential development.

71. Defendant's possession of the subject property since 1949, and its condemnations of leaseholds of the subject property since 1962, and its intention, held since no later than 1953, to condemn similar leaseholds indefinitely into the future to satisfy its permanent need for a safety or buffer zone surrounding the ammunition and bomb storage area of the March Air Force Base, a public purpose, constitute a taking of an interest such as a perpetual easement or a fee for which just compensation is payable.

72. The taking was authorized.

73. The cause of action arose in 1973.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover just compensation for the taking of a permanent interest such as a perpetual easement or the fee over the land which is the subject of the case, upon the tender to the Attorney General, in a form satisfactory to him, of a deed to the interest taken, and judgment is entered to that effect, with the exact amount of the recovery and the exact nature of the estate to be conveyed by deed to be determined in further proceedings under rule 131(c).

APPENDIX B.

Opinion.

In the United States Court of Claims, No. 79-74 (Decided September 10, 1980).

Southern California Financial Corporation v. The United States.

Paul J. Hall, for plaintiff; *Marshall Manley*, attorney of record. *Manatt, Phelps, Rothenberg & Tunney*, of counsel.

C. David Redmon, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *Nancy E. Stanley*, of counsel.

OPINION

Before Cowen, *Senior Judge*, Davis and Nichols, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

Plaintiff Southern California Financial Corporation sues for an inverse condemnation of a tract of land adjoining that part of March Air Force Base, near Riverside, California, which is used as a bomb and ammunition storage area. The Government's motion for summary judgment was previously denied and the case was remanded for trial. The case has been tried before Trial Judge Schwartz, and we now hold, reversing the trial judge's opinion, that plaintiff is not entitled to prevail in this suit.[1]

From 1949 to 1961, the United States had possession of the tract as a tenant of plaintiff's predecessor, pursuant to nonexclusive leases for periods of a year or less, each lease extendible for four or five periods of a year. All the renewal options were exercised through 1961. In 1962, the owner declined to lease the land at the offered rental, and so the Government condemned a 6-months lease, extendible for

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[1]The necessary findings of fact are contained in this opinion.

periods of 1 year each. A similar condemnation took place in 1967.

Plaintiff bought the land in 1969. When the 1967 lease as extended expired in 1972, plaintiff would not agree to another lease, and asked that the Government buy the fee. The Government thereupon instituted another proceeding to condemn a lease of the same kind as before. A defense in the condemnation proceeding that the series of leases amounted to a condemnation of the fee, for which full payment ought to be made, was dismissed by the District Court, on the Government's motion contending that such a defense could not be raised in the court in which condemnation proceedings were instituted.

The condemnation proceeding continued in the District Court and culminated in a leasehold similar to those in the past, beginning in 1972. Plaintiff brought suit here in 1974 for an inverse condemnation of the fee, or more properly, of plaintiff's reversion. Another leasehold, similar to those in the past, was condemned in 1977, extendible until 1981.

The trial judge has found the following in this suit: "The bomb and ammunition storage area of the March Air Force Base is located in its northwest corner. The tract in question, some 119.5 acres, abuts this corner on both the north and the west, and serves the base as a buffer or safety zone for the event of a possible explosion of the stored bombs and ammunition. It [appears most probable] that March Air Force Base, one of the oldest and largest of its kind, will remain indefinitely a major air force base and that so long as bombs and ammunition are used, and stored as they [now] are, the plaintiff's land will be needed as a buffer and safety zone. Further, it is agreed that there are no plans to change the place of bomb storage; the storage installation is a permanent one. * * * While the leases are non-exclusive, and reserve to plaintiff the right to conduct agricultural opera-

tions, the land cannot be farmed with profit. Residential development and substantially all other use is forbidden under the terms of the leases; structures for 'human habitation' may not be built or maintained, and gatherings of more than 25 persons are forbidden." Trial Judge's Opinion at 3-6.

The history of the Government's attitude toward the length and type of the condemnation of this land is revealing. It is undisputed that since at least 1953 defendant has had a need for the property for an indefinite term contingent upon the existence of an ammunition storage area in its present location on March Air Force Base. Beginning in 1956 the Air Force considered whether to acquire fee title to the tract in suit, but by 1963 the acquisition of a fee had been abandoned and it was decided to continue leasing the land on temporary renewable terms, because leasing was more economical for the United States—so the trial judge has found. This decision was reaffirmed in 1967 and not again questioned by the acquiring agency. The trial judge found, and we need not disagree: "The Government's motive is simply economy. The Air Force, recognizing that its need was permanent, has at times considered the relative cost of leasing and buying, concluded that leasing would be cheaper, and dropped the idea of acquisition of a fee. Moreover, it is administratively easier to pay the modest annual rent fixed in the condemnation proceedings than to obtain an appropriation of the money to pay for a fee or a permanent easement. Annual rents can be paid from a non-specific appropriation for maintenance. Condemnation of the fee or a permanent easement, on the other hand, would require the Air Force to seek appropriation in competition with all other capital improvements for which Congress must be asked for money. The reluctance to seek a large

enough appropriation to pay for the interest actually taken is seen in the present record''[2] *Id.* at 5.

At the trial, plaintiff made proof that the highest and best use of the land is to hold it for speculation for future development as a residential area. The speculative potential is somewhat dubious for a number of reasons, among them the noise of overflying planes, the proximity of the land to the ammunition dump and the restrictive zoning, under which residential development is not possible. But exact value aside, the trial judge found that the use to which the Government puts the land, coupled with the intention to condemn an indefinite series of leases, deprives the plaintiff of the highest and best use of the land. This, according to the trial judge, meant that defendant had taken an interest tantamount to a fee or perpetual easement for which just compensation had to be made. The amount was left for further litigation.

I.

We can assume *arguendo* (and without deciding) that the trial judge's determination of the hard facts is fully correct, but nevertheless we cannot hold that a compensable taking of a fee or perpetual easement has occurred. The reason why we depart from the trial judge is that, unlike him, we find lack of authority for the Air Force, acting by itself, to take a fee or perpetual easement of the value involved here.

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[2]In large part the trial judge based his conclusion that the defendant intended a permanent taking on the following summary of a statement by a representative of the Department of Justice at a status conference in the 1972-73 condemnation suit in the District Court: ''it was his understanding that the United States government intended to continue to condemn the property which was the subject of the action continuously in the future in similar manner in which they had done in the past and that * * * they had no intention to release the property to the owners and * * * as far as they could determine, they would continue to condemn the property in the future ad infinitum.'' *Id.* at 13.

That authority could be given only in a Military Construction Appropriation Act, and the Air Force deliberately refrained from seeking such congressional sanction. There was therefore no authority in the Air Force to take the permanent interest which the trial judge has found here. In the remainder of this part we spell out these conclusions, step by step.

First, it is imperative that, before a compensable taking can be found by the court, there must be some congressional authorization, express or implied, for the particular taking claimed. *E.g., NBH Land Co. v. United States*, 217 Ct. Cl. 41, ___, 576 F.2d 317, 319-20 (1978); *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 771-72, 572 F.2d 786, 819 (1978); *Coleman v. United States*, 215 Ct. Cl. 1030, 1031 (1978) (order); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 147-48, 550 F.2d 639, 649 (1977); *Huerta v. United States*, 212 Ct. Cl. 473, 484, 548 F.2d 343, 348, *cert. denied*, 434 U.S. 828 (1977); *Eyherabide v. United States*, 170 Ct. Cl. 598, 606-07, 345 F.2d 565, 570 (1965).

Second, in this instance it is clear that a taking of the permanent or indefinite character now claimed by plaintiff would have required the specific consent of Congress under the annual Military Construction Program.[3]

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[3]The trial judge's findings, which we adopt on this point, make this conclusion absolutely plain. He found:

"Air Force acquisitions of interests in land with a value in excess of $50,000 must be approved under the annual Military Construction Authorization Act. Authorization for a purchase of an interest in land in excess of $50,000 for March Air Force Base would require the approval of the intermediate command, the 15th Air Force; the SAC; the Director of Civil Engineering, Headquarters, USAF; the Deputy Chief of Staff for Programs and Resources and the Air Force Council; the Office of the Secretary of the Air Force, specifically the Deputy Assistant Secretary for Installations; the Office of the Secretary of Defense; the Office of Management and Budget; the Budget of the President of the United States; and ultimately, Congressional authorization

Third, in seeking renewable one-year leases, the Air Force deliberately sought to avoid the need for approval in an annual Military Construction Appropriations Act, and no such consent was obtained.[4]

Fourth, an executive agency is not authorized to take steps resulting in a compensable taking where Congress has refused to authorize such a taking or properly expects that no such taking can occur unless specified procedures involving Congress are followed. In *NBH Land Co., supra,* the court rejected an attempt to find an implied taking where Congress had rejected proposals to acquire the land under the fiscal 1975 and 1976 Military Construction requests. The court thought that, to allow judicial compensation for an inverse taking, "when the only participation by Congress has been to reject the acquisition out of hand, would strike a blow at the power of the purse" and held that, by passing

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through the annual Military Construction Appropriations Act." Trial Judge's Opinion at 23.

"Processing a request through the procedure of the Military Construction Program requires, at a minimum, approximately 1 year. When the determination had to be made as to whether to continue the condemnation of a leasehold in the subject property that had begun in 1962, it was already too late to include an appropriation for purchase of the subject property in the 1967 Military Construction Program. For instance, a July 1967 purchase request could not result in authorization for funding to purchase before July 1968." *Id.*

"Air Force acquisition of any interest in land that has a cost of under $50,000 can be handled as a minor land acquisition funded from the annual operation and maintenance program, and such an acquisition under $50,000 does not require authorization under a Military Construction Program." *Id.*

[4]The trial judge found in a finding which we also accept:

"In reaching the decision in 1967 to condemn successive 1-year leasehold interests in the subject property, the Air Force considered that the expected use of the subject property would exceed a 5-year period. The technique of condemning a 1-year leasehold renewable for a 5-year period was chosen because leaseholds are funded under annual funds which cannot be used to enter into an obligation for longer than 1 year. This procedure allowed acquisition of the subject property without involvement in the annual Military Construction Program." *Id.*

the Tucker Act, "Congress did not strip itself of all control over the obligation of public funds by land takings without condemnation." 217 Ct. Cl. at ___, 576 F.2d at 319. That case is closely germane here where the reason Congress did not act was solely because the Air Force did not wish to give it the opportunity to decide whether or not to take a permanent or indefinite interest in the land. Congress and the Air Force firmly expected Congress to consider all military acquisitions of the size for which plaintiff seeks compensation, and we cannot by-pass the congressional will simply because the Air Force may have thought that it could do so by condemning successive one-year terms renewable for five years.

Fifth, it would be an invasion of the letter and spirit of the Military Construction Program and the Military Construction Appropriation Acts for the Air Force intentionally to substitute indefinite or permanent one-year renewable tenancies for the taking of a fee or indefinite interest costing enough to require inclusion under the Military Construction Program. Congress had established a procedure for the larger expenditures which it meant and desired to be followed. *See, e.g.*, 10 U.S.C. § 2233a (as it existed prior to December 1974).[5] The Air Force could not attain the same result by camouflaging a larger taking in the guise of successive renewable leases which were not reviewable by Congress.

Sixth, the trial judge relied on the implied authority found, first, in decisions involving actual physical intrusion onto or over the claimant's land (like *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), and

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[5]This suit was brought in May 1974 and the trial judge found that the asserted "taking" of the larger interest took place in 1973, within the limitations period.

United States v. Causby, 328 U.S. 256 (1946)), and, second, in cases of a taking through severe regulation or hemming-in without physical invasion or ouster (like *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977), and *Drakes Bay Land Co. v. United States*, 191 Ct. Cl. 389, 424 F.2d 574 (1970)). Neither set of precedents is apt. In those cases there was no congressional limitation or understanding that Congress itself would have to consider whether there should be a compensable acquisition of the magnitude claimed—as there is here. On the contrary, the takings judicially found were considered to be "a natural consequence of congressionally approved measures" or "the good faith implementation of a Congressional Act." *NBH Land Co., supra*, 217 Ct. Cl. at ___, 576 F.2d at 319. The express demand in this case that Congress consider and authorize a permanent or indefinite acquisition of this size makes all the difference. The Air Force was not empowered by itself to take a fee or indefinite easement on plaintiff's land, nor was it authorized to take successive one-year easements intending those easements to be permanent or without limit in time. In the face of the express requirement to seek Congressional consent in a Military Construction Authorization statute, there can be no implied authority to take a permanent or indefinite interest apart from that route.[6]

The sum of it is that, even accepting the trial judge's findings *arguendo*, we cannot see the necessary authorization for the acquisition by plaintiff of a fee or indefinite interest through this Tucker Act proceeding. As *NBH Land*

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[6]We note in passing (a) that, unlike *Portsmouth* and *Causby*, there was no existing physical intrusion onto plaintiff's land through Air Force activities on adjacent March Air Force Base, and (b) that it is unlikely that the mere danger from the adjacent ammunition dump, not involving any existing invasion of plaintiff's land, would constitute, in itself, a Fifth Amendment taking. *See Avery v. United States*, 165 Ct. Cl. 357, 362-66, 330 F.2d 640, 643-45 (1964).

Company held, it is important for us to abide by established limitations calling for congressional scrutiny of acquisitions, and not to evade those restrictions via the Tucker Act. 217 Ct. Cl. at ___, 576 F.2d at 319. We would thwart a specific congressional desire if we were to hold that the larger interest had been taken despite the absence of the necessary congressional consent.

II.

Is plaintiff left without a remedy, if the trial judge is right that the Government's method of procuring successive temporary interest leads to the virtual use by the Government, without proper payment, of a full-scale interest equal to a fee or perpetual easement? We think not. Next time around (in 1981 or 1982), plaintiff can oppose the Air Force's effort to obtain another group of successive one-year easements by urging the District Court that the Government's attempt is not in good faith or in the exercise of proper discretion—that the Air Force intends in fact to keep a permanent or indefinite hold on the tract, and the method of successive leases deprives plaintiff of just compensation. If the District Court agrees with that contention, it should, we think, reject the defendant's condemnation suit on the ground that a permanent interest is not obtainable by these successive temporary interests and that the Government is trying to evade the mandatory requirement of seeking and getting congressional approval for the greater interest. *See United States v. 64.88 Acres of Land,* 244 F.2d 534, 536 (3rd Cir. 1957); *Simmonds v. United States,* 199 F.2d 305, 307 (9th Cir. 1952); *United States v. Meyers,* 113 F.2d 387, 392

(7th Cir.), *cert. denied,* 311 U.S. 706-07 (1940).[7] In that event, the Government would be unable to secure a permanent or indefinite interest in the land without going through the route of the Military Construction Program. If despite the court's refusal to allow condemnation in the same form as before, the Air Force tries to implement or enforce a temporary easement, plaintiff will have the remedy of an injunction.[8] If the District Court disagrees with plaintiff, the latter will have its right of appeal. We do not think that plaintiff is on the horns of an insoluble dilemma.

CONCLUSION OF LAW

The court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

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[7]In the 1972-1973 District Court condemnation action, present defendant moved to strike present plaintiff's defense that the landowner may challenge the Government's denomination of its taking in the District Court proceeding as a succession of one-yer easements. Unfortunately, present plaintiff filed a notice of non-opposition to the motion, and it was granted by the District Court. Present plaintiff then filed suit in this court. But plaintiff's mistake in agreeing to the Government's motion cannot give us authority we do not have. Nor are we estopped by the proceedings in the District Court from following the course we believe to be compelled by the law.

[8]Ordinarily, whenever there is no authority for a taking or intrusion, the claimant although unable to obtain compensation, can seek an injunction or a declaratory judgment against the unauthorized governmental activities.

APPENDIX C.

Order.

In the United States Court of Claims, No. 79-74.

Southern California Financial Corporation v. The United States.

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and NICHOLS, *Judge*.

ORDER

This case comes before the court on plaintiff's motion, filed September 29, 1980, for rehearing *en banc* pursuant to Rules 7(d) and 151(b), with reference to the decision entered herein on September 10, 1980. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing is denied.

OCT. 31, 1980.

BY THE COURT,
/s/ OSCAR H. DAVIS,
Oscar H. Davis,
Judge, Presiding

APPENDIX D.

Complaint in Condemnation and Demand for Jury Trial.

United States District Court, Central District of California.

United States of America, Plaintiff, v. 214.69 Acres of Land, More or Less, Situate in Riverside County, State of California, Erwin P. Werner, et al., and Unknown Owners, Defendants. No. 72-1505 CC Civil.

COMES NOW the plaintiff, United States of America, by its attorneys, William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, and Bryan N. Freeman, Assistant United States Attorney, Central District of California, on application of the Secretary of the Air Force of the United States of America, and by the authority, and under the direction, of the Attorney General thereof, and for cause of action against the defendants, and each of them, alleges as follows:

1. That this is an action of a civil nature brought by the United States of America, at the request of the Secretary of the Air Force thereof, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owner or owners and party or parties in interest;

2. That the authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1883 (25 Stat. 357, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes. Funds for such purposes will be made available by the Department of Defense Appropriation Act for 1973,

or, if not enacted prior to July 1, 1972, by a Joint Resolution of Congress.

3. The public uses for which said land is taken are as follows: The said land is necessary to provide for the establishment of facilities for the use of the Department of the Air Force and for other military uses incident thereto. The land has been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with March Air Force Base, Riverside County, State of California, and for such other uses as may be authorized by Congress or by Executive Order.

4. A general description of the land being taken is set forth in Exhibit "1", attached hereto and made a part hereof.

5. The estate taken for said public uses is a non-exclusive term for years beginning July 1, 1972, and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1977, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore or hereafter placed thereon by or for the United States; reserving to the owners, their heirs, executors and assigns the right to cultivate the land for any and all crops which may be grown thereon; provided, however, that no structures for human habitation shall be constructed and maintained on the land; provided, further, that no gathering of more than twenty-five persons shall be permitted thereon; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

6. The persons known to plaintiff who have or claim to have an interest in the property are those whose names and their addresses, if known, appear in Exhibit "2", attached hereto and made a part hereof.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to plaintiff, and such persons are made parties to the action under the designation "Unknown Owners".

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking thereof be ascertained and awarded, and for such other relief as may be lawful and proper.

DATED: June 30, 1972.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
BRYAN N. FREEMAN
Assistant U. S. Attorney
By /s/ BRYAN N. FREEMAN,
Bryan N. Freeman
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by plaintiff.

DATED: June 30, 1972.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
BRYAN N. FREEMAN
Assistant U. S. Attorney
By /s/ BRYAN N. FREEMAN,
Bryan N. Freeman
Attorneys for Plaintiff

EXHIBIT "1"

Tract Description

TRACT D-462.

The North one-half of the South one-half of the Northwest one-quarter. The north one-half of the South one-half of the South one-half of the Northwest one-quarter. All in Section 16, Township 3 South, Range 4 West, San Bernardino Meridian, according to the official plat of the survey of said land on file in the Bureau of Land Management. Situate in Riverside County, California.

EXCEPTING therefrom the North 75.00 feet thereof.

Containing 55.46 acres, more or less.

TRACT D-468.

The Southeast quarter of the Southeast quarter of Section 16, Township 3 South, Range 4 West, San Bernardino Meridian, Riverside County, State of California.

Containing 40 acres, more or less.

TRACT D-496-2.

The South 840 feet of the East 840 feet of the Northeast quarter, and the East 1,700 feet of the Southeast quarter of Section 17, Township 3 South, Range 4 West, San Bernardino Meridian, in the County of Riverside, State of California.

Containing 119.23 acres, more or less.

EXHIBIT "2"

Names and Addresses of Purported Owners.

TRACT D-496-2: Mary Hendrick Trautwein
Caroline H. Trautwein
Emily T. Stoddard
Archer I. Schweizer
Margaret T. Stoddard
Kenneth H. Colville
William T. Colville, Jr.
Jessie Colville Powell
Dorothy Colville Dann
c/o Hill, Farrer & Burrill, Attorneys
445 South Figueroa Street
Los Angeles, California 90017
Southern California Financial
Corporation
9100 Wilshire Boulevard, Suite 1003
Beverly Hills, California 90212

TRACTS D-462 and D-468:

Erwin P. Werner
827 Broadway
P. O. Box 815
Needles, California 92563

APPENDIX E.

Declaration of Taking.

United States District Court, Central District of California

United States of America, Plaintiff vs. 214.69 Acres of Land, More or Less, Situate in Riverside County, State of California, and Erwin P. Werner, et al., Defendants. Civil No. 72-1505-JWC.

To the Honorable, the United States District Court:

I, the undersigned, Philip N. Whittaker Assistant Secretary of the Air Force, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Section 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes. Funds for such purposes will be made available by the Department of Defense Appropriation Act for 1973, or, if not enacted prior to July 1, 1972, by a Joint Resolution of Congress.

(b) The public uses for which said land is taken are as follows: The said land is necessary to provide for the establishment of facilities for the use of the Department of the Air Force and for other military uses incident thereto. The land has been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with March Air Force Base, Riverside County, State of California, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estate taken for said public uses is a non-exclusive term for years beginning July 1, 1972, and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1977, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore or hereafter placed thereon by or for the United States; reserving to the owners, their heirs, executors and assigns the right to cultivate the land for any and all crops which may be grown thereon; provided, however, that no structures for human habitation shall be constructed and maintained on the land; provided, further, that no gathering of more than twenty-five persons shall be permitted thereon; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said land, with all buildings and improvements thereon, and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for

said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the undersigned, the Assistant Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 22nd day of June A.D. 1972, in the City of Washington, District of Columbia.

/s/ Philip N. Whittaker
Assistant Secretary of the Air Force

SCHEDULE "A".

The land which is the subject matter of this declaration of taking aggregates 214.69 acres, more or less, situate and being in the County of Riverside, State of California, and in the same land described in the complaint heretofore filed in this action. A description of the land taken, together with the names and addresses of the purported owners thereof, and a statement of the sum estimated to be the just compensation for the taking of the nonexclusive use and possession for the period beginning July 1, 1972, and ending March 31, 1973, is as follows:

TRACT D-462.

The North one-half of the South one-half of the Northwest one-quarter. The north one-half of the South one-half of the South one-half of the Northwest one-quarter. All in Section 16, Township 3 South, Range 4 West, San Bernardino Meridian, according to the official plat of the survey of said land on file in the Bureau of Land Management.

EXCEPTING therefrom the North 75.00 feet thereof.

Containing 55.46 acres, more or less.

NAME AND ADDRESS OF PURPORTED OWNER:

Erwin P. Werner
827 Broadway
Needles, California

ESTIMATED COMPENSATION: $3,396.93

TRACT D-468.

The Southeast quarter of the Southeast quarter of Section 16, Township 3 South, Range 4 West, San Bernardino Meridian, Riverside County, State of California.

Containing 40 acres, more or less

NAME AND ADDRESS OF PURPORTED OWNER:

Erwin P. Werner
827 Broadway
Needles, California

ESTIMATED COMPENSATION: $2,450.00

TRACT D-496-2.

The South 840 feet of the East 840 feet of the Northeast quarter, and the East 1,700 feet of the Southeast quarter of Section 17, Township 3 South, Range 4 West, San Bernardino Meridian in the County of Riverside, State of California.

Containing 119.23 acres, more or less.

NAMES AND ADDRESS OF PURPORTED OWNERS:

Mary Hendrick Trautwein
Caroline H. Trautwein
Emily T. Stoddard
Archer I. Schweizer
Margaret T. Stoddard
Kenneth H. Colville
William T. Colville, Jr.
Jessie Colville Powell
Dorothy Colville Dann
c/o Hill, Farrer & Burrill, Attorneys
445 South Figueroa Street
Los Angeles, California

ESTIMATED COMPENSATION: $7,302.84

The gross sum estimated by the acquiring agency to be the just compensation for the estate hereby taken for the term beginning July 1, 1972 and ending March 31, 1973 is THIRTEEN THOUSAND ONE HUNDRED FORTY NINE AND 77/100 DOLLARS ($13,149.77).

APPENDIX F.

Answer to Complaint in Condemnation (Tract D-496-2).

United States District Court, Central District of California.

United States of America, Plaintiff, vs. 214.69 Acres of Land, More or Less, Situate in Riverside County, State of California, Erwin P. Werner, et al., and Unknown Owners, Defendants. No. 72-1505-JWC-Civil.

Defendant Southern California Financial Company, owner of the tract designated D-496-2, answering the complaint on file herein, admits, denies and alleges as follows:

1. In answer to the allegations of paragraph 1, defendant alleges that it has no information or belief sufficient to enable it to answer the allegations contained in paragraph 1, and upon that ground denies each and every allegation contained therein.

2. In answer to the allegations of paragraph 2, defendant alleges that it has no information or belief sufficient to enable it to answer the allegations contained in paragraph 2, and upon that ground denies each and every allegation contained therein.

3. In answer to the allegations of paragraph 3, defendant denies that said land is necessary to provide for the establishment of facilities for the use of Department of the Air Force and for other military uses incident thereto, and except as denied above alleges that it has no information or belief sufficient to enable it to answer the remaining allegations contained in paragraph 3, and upon that ground denies each and every allegation contained therein.

4. In answer to the allegations of paragraph 4, defendant admits that a general description of land is attached to the complaint as Exhibit 1 and made part thereof; and except

as admitted above alleges that it has no information or belief sufficient to enable it to answer the remaining allegations contained in paragraph 4, and upon that ground denies each and every allegation contained therein.

5. In answer to the allegations of paragraph 5, defendant denies generally and specifically each and every allegation contained in paragraph 5.

6. In answer to the allegations of paragraph 6, defendant admits that Southern California Financial Corporation has an interest in certain of the property subject of this action; admits that a list of names and addresses is attached to the complaint as Exhibit 2 and made a part thereof; and except as admitted above alleges that this answering defendant has no information or belief sufficient to enable it to answer the remaining allegations contained in paragraph 6 and on that ground denies each and every allegation contained therein.

7. In answer to the allegations of paragraph 7, defendant alleges that it has no information or belief sufficient to enable it to answer the allegations contained in paragraph 7, and upon that ground denies each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE.

8. For a first, separate and affirmative defense defendant alleges that the Secretary of the Air Force has acted in an arbitrary and capricious manner in determining that the land subject of this action is necessary for the purposes specified in the acts referred to in paragraph 2 of the complaint herein.

SECOND AFFIRMATIVE DEFENSE.

For a second, separate, and affirmative defense defendant alleges that:

9. The United States has condemned a one-year leasehold interest in the subject property renewable at the sole

discretion of the United States for yearly terms up to a total of five years every five years commencing with the year 1942.

10. At each year since 1942 the United States has exercised its condemned right of renewal of the leasehold interests that were condemned in 1942, 1947, 1952, 1957, 1962 and 1967.

11. Defendant is informed and believes and based upon such information and belief alleges that the United States intends, if their complaint in condemnation be granted, to extend said leasehold each year until March 31, 1977 and then further intends to file another action to condemn a further leasehold interest for one year renewable at the option of the United States for four years in 1977; and further intends to continue said pattern of condemnation every five years and renewal of the leasehold interest every year for an indefinite period in the future.

12. As a result of said past and future actions as set forth hereinabove, defendant alleges that in fact and effect plaintiff has taken and is seeking to take by this action in condemnation all of defendant's right and interest in Tract D-496-2 and by reason thereof defendant is entitled to the fair market value of the fee ownership interest in said tract as of June 30, 1972.

13. The fair market value of Tract D-496-2 as of June 30, 1972 is in excess of $600,000.

WHEREFORE, this answering defendant prays as follows:

1. That the Tract D-496-2 not be condemned;

2. That if said tract is condemned that defendant be awarded the fair market value of the fee interest in said tract as of June 30, 1972;

3. For cost of suit herein; and

4. For such other and further relief as the court deems proper.

Dated: January 12, 1973.

McKENNA, FITTING & FINCH,
By /s/ MARSHALL MANLEY,
Marshall Manley
Attorneys for Defendant
Southern California Financial
Company

APPENDIX G.

Motion to Strike Answer of Defendant Southern California Financial Corporation to Complaint in Condemnation, Notice Thereof, and Memorandum of Points and Authorities (As to Tract D-496-2).

United States District Court, Central District of California.

United States of America, Plaintiff, v. 214.69 Acres of Land, More or Less, Situate in Riverside County, State of California et al., Defendants. No. 72-1505-JWC Civil.

FILED: May 17, 1973.

COMES NOW the plaintiff, United States of America, by its attorneys, William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, and Bryan N. Freeman, Assistant United States Attorney, Central District of California, and moves to strike paragraphs 3 and 5 and First Affirmative Defense (paragraph 8) and Second Affirmative Defense (paragraphs 9 to 13, inclusive), and paragraphs 1, 2 and 3 on page 4, from the Answer of defendant Southern California Financial Corporation to the Complaint in Condemnation, pursuant to Rule 12(f), F.R.Civ.P., because said portions of said Answer contain insufficient defenses and immaterial matters, and in particular (1) contain an attempt to challenge the right of the United States to effect a temporary taking herein, which is an administrative matter and not reviewable in

these proceedings, and (2) improperly pray for costs of suit, which are not recoverable in a condemnation proceeding.

DATED: May 17, 1973.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
By /s/ BRYAN N. FREEMAN,
Bryan N. Freeman,
Assistant U. S. Attorney
Attorneys for Plaintiff,
United States of America

NOTICE OF MOTION.

TO DEFENDANT SOUTHERN CALIFORNIA FINANCIAL CORPORATION AND ITS ATTORNEYS OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the foregoing motion will come on for hearing before the Honorable Jesse W. Curtis, United States District Judge, in his courtroom in the United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, on Monday, the 13th day of June, 1973, at 10:00 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED: May 17, 1973.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
By /s/ BRYAN N. FREEMAN,
Bryan N. Freeman,
Assistant U. S. Attorney
Attorneys for Plaintiff,
United States of America

MEMORANDUM OF POINTS AND AUTHORITIES.

A. Preliminary Statement

The defendant Southern California Financial Corporation has filed an answer pursuant to motion in the within condemnation proceeding with respect to Tract D-496-2, containing 119.23 acres. The tract is subject to the estate taken herein, which is specified in the declaration of taking and complaint in condemnation precisely as follows:

> ". . . a non-exclusive term for years, beginning July 1, 1972, and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1977, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore or hereafter placed thereon by or for the United States; reserving to the owners, their heirs, executors and assigns the right to cultivate the land for any and all crops which may be grown thereon; provided, however, that no structures for human habitation shall be constructed and maintained on the land; provided, further, that no gathering of more than twenty-five persons shall be permitted thereon; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines."

The defendant Southern California Financial Corporation (hereinafter SCFC), in its answer, denies that the subject tract is necessary to provide for the establishment of facilities for the use of the Department of the Air Force (paragraph 3), denies the estate taken (paragraph 5), alleges arbitrary and capricious conduct on the part of the Secretary of the

Air Force (first affirmative defense), alleges that the estate condemned by this action is the fee ownership (second affirmative defense), and seeks that the tract not be condemned or that fee value be awarded, and also that costs of suit be awarded defendant.

The above allegations are essentially identical to the allegations contained in the answer of co-defendant Erwin P. Werner, all of which were stricken pursuant to motion by plaintiff. These allegations should accordingly be stricken from defendant SCFC's answer for the same reasons, as further discussed below.

B. Statement of Law

I. THE NECESSITY OF THE TAKING IS NOT SUBJECT TO JUDICIAL REVIEW WHERE THE USE IS FOR PUBLIC PURPOSES.

An excellent discussion of the subject of necessity of the taking is contained in *United States v. 2,606.84 Acres of Land*, the Court holding:

> ". . . The argument that land sought to be condemned is not really necessary for the consummation of a plan is frequently made in condemnation cases in an attempt to defeat the taking. This argument, however, has been unanimously rejected by every court which has considered the matter. It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project. . . . 'Numerous cases sustain the proposition that the purpose intended being valid, the necessity of the taking and the character of the title to be taken are decisions vested exclusively in the Secretary . . .'
>
> "The only exception to this rule would occur if the delegated official so overstepped his authority that no reasonable man could conclude that the land sought to

be condemned had some association with the authorized project. In such a case alone could the taking be considered arbitrary or capricious as those terms are used in condemnation proceedings. There must be basic to the project pervasive deception, unreasoned decision, or will-of-the-wisp determination before these words of pejoration are brought into play." (5th Cir. 1970) 432 F.2d 1286, 1289, 1290.

See also: *Berman v. Parker* (1954), 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27;

United States v. Mischke (8th Cir. 1961), 285 F.2d 628, 631.

II. THE ESTATE TAKEN IS A TEMPORARY INTEREST BY THE TERMS OF THE TAKING

The defendant alleges that the taking by the United States is a taking of all of defendant's right, title and interest and its entire fee ownership in the subject tract. A reading of the estate taken as quoted hereinabove demonstrates that it expressly limits the taking to a non-exclusive term for years beginning July 1, 1972 and ending March 31, 1973, and extendible for yearly periods thereafter, at the election of plaintiff, until March 31, 1977. The taking is for a definite, fixed, and limited period of time. Further, the right to cultivate the land is reserved to the landowner, subject, of course, to the restrictions regarding structures and gatherings of people on the premises. Under the terms of the taking the landowner is free to alienate the property in any lawful manner as he deems fit, subject to the estate taken.

III. IN ITS EXERCISE OF THE POWER OF EMINENT DOMAIN, THE UNITED STATES MAY TAKE AN INTEREST LESS THAN THE FEE SIMPLE ABSOLUTE.

The Government has the power to condemn a term for years. See, for example, *United States v. General Motors*,

323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945), *Kimball Laundry v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765.

This, of course, is in line with the provisions of the Declaration of Taking Act, the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a), which provides, in pertinent part:

> "In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by the law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .
>
> * * *
>
> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to said lands in fee simple absolute, *or such less estate or interest therein as is specified in said declaration,* shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; . . ." [Emphasis added.]

The authority for the instant taking is found in Sections 2663 and 9773 of Title 10, United States Code. In particular, in said section 2663, it is provided that:

> ". . . (a) The Secretary of a military department may have proceedings brought in the name of the United

> States . . . to acquire by condemnation any interest in land, including temporary use, . . ."

Thus, the taking of the subject estate in this action is fully authorized.

IV. THE DEFENDANT MAY NOT CHALLENGE THE ESTATE TAKEN IN THIS PROCEEDING.

In *Simmonds v. United States,* the Ninth Circuit, in determining whether a condemnee could require the United States to acquire an easement interest as opposed to the fee, the Court ruled that:

> ". . . Discretion regarding the acquisition of property by the exercise of the power of eminent domain, rather than by direct purchase, lies with any federal officer acting under the mandate of Congress. Congress has established as the standard for the exercise of discretion the 'opinion' of an authorized official that condemnation would be 'necessary or advantageous to the Government'. 40 U.S.C.A. § 257. . . . Therefore, where the statute which is being implemented contains Congressional authority to take property by eminent domain . . ., the officer authorized to act is under the duty of exercising his discretion as to the estate he elects to take." 199 F.2d 305, 306 (1952).

It is beyond the jurisdiction of the court to vary the estate sought by the Government in a condemnation proceeding. In *United States v. Brondum,* the issue was the interpretation of the estate taken, whether a clearance easement or avigation easement. The Circuit limited the taking precisely as stated in the declaration of taking, holding that:

> ". . . in a condemnation proceeding courts cannot compel the United States to take and pay for an estate not described in the declaration of taking." (5th Cir. 1959) 272 F.2d 642, 646-47.

See also: *Wilson v. United States* (10th Cir. 1965) 350 F.2d 901, 906;

United States v. 64.88 Acres of Land (3rd Cir. 1957) 244 F.2d 534, 536.

The fact that the subject property has been used in the past by the Government is irrelevant in this proceeding. It should be noted that the defendant SCFC is not in a position to complain about prior takings, since it purchased the subject property in 1969 with notice of, and subject to, the Government's interest acquired in 1967. Further, the defendant's predecessors in title have been fully compensated for the prior use of the property. Hence, regardless of a prior use, the issue to be determined in the instant condemnation proceeding is the just compensation payable for the estate expressly condemned herein by the Government, that is, the designated use for the initial term commencing in July, 1972 and ending March 31, 1973, extendible for yearly periods thereafter until March 31, 1977.

The issue to be determined in the instant proceeding is the fair market rental value of the interests taken as of the date of the Government's taking. The Supreme Court, in *Kimball Laundry v. United States*, held that where there is a taking of a temporary interest,

> ". . . the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in the two recent cases dealing with temporary takings [citing cases]". 338 U.S. 1, 7, 69 S.Ct. 1434, 93 L.Ed. 1765.

V. COSTS OF SUIT ARE NOT ALLOWABLE IN A CONDEMNATION PROCEEDING.

The Constitution requires payment for the property taken, and this has been interpreted as excluding such incidental damages as expenses incurred by the defendants in litigating

their claim. In *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930), the Court said:

> "Attorneys' fees and expenses are not embraced within the just compensation for land taken by eminent domain."
>
> *United States v. Worley*, 281 U.S. 339, 344, 50 S.Ct. 291, 74 L.Ed. 887 (1930);
>
> *United States v. Patterson*, 206 F.2d 345, 348 (5th Cir. 1953).

In particular, it should be noted that Rule 71A(1), F.R.Civ.P., provides:

"Costs are not subject to Rule 54(d)."

With respect to this provision, the Advisory Committee on Rules states:

> "Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable."

Thus, although the United States is the prevailing party in a condemnation proceeding, costs are not allowed to be taxed against the landowner, and, accordingly, may not be taxed against the United States.

VI. CONCLUSION.

Plaintiff submits that the portions of the answer of defendant SCFC referred to in plaintiff's motion should be stricken, as they contain insufficient defenses and immaterial matters. Defendant's answer is merely an attempt to

have the Court enlarge the estate taken in these proceedings beyond that expressly taken in the declaration of taking. For this reason, said portions of the answer are improper and are subject to a motion to strike under Rule 12(f), F.R.C.P.

Respectfully submitted,

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
By /s/ BRYAN N. FREEMAN
Bryan N. Freeman
Assistant U. S. Attorney
Attorneys for Plaintiff,
United States of America

I, CARON RHODES, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on May 17, 1973, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of MOTION TO STRIKE ANSWER OF DEFENDANT SOUTHERN CALIFORNIA FINANCIAL CORPORATION TO COMPLAINT IN CONDEMNATION, NOTICE THEREOF, AND MEMORANDUM OF POINTS AND AUTHORITIES, addressed to McKENNA, FITTING & FINCH, 3435 Wilshire Blvd., 24th Floor, Los Angeles, Calif. 90010. Attention: ROBERT E. MANGELS, ESQ. at their last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on May 17, 1973, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ CARON RHODES
Caron Rhodes

APPENDIX H.

Notice of Non-Opposition to Motion to Strike Answer of Southern California Financial Corporation.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. 214.69 Acres of Land, More or Less, Situated in Riverside County, State of California, Erwin P. Werner, et al., and Unknown Owners, Defendants. No. 72-1505-JWC Civil.

TO: ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Defendant SOUTHERN CALIFORNIA FINANCIAL CORPORATION will not oppose the Motion to Strike paragraphs 3 and 5 of its answer, the First and Second Affirmative Defenses and paragraphs 1, 2 and 3 on page 4 of its answer. This Non-Opposition is intended to be without prejudice to Defendant SOUTHERN CALIFORNIA FINANCIAL CORPORATION'S right to pursue the issues raised in its answer in the United States Court of Claims, or to its right to appeal.

Dated: June 7, 1973.

McKENNA, FITTING & FINCH
By /s/ ROBERT E. MANGELS
Robert E. Mangels
Attorneys for Defendant,
Southern California Financial
Corporation

Affidavit of Service by Mail.

State of California, County of Los Angeles—ss.

I, Dee Rutherford, being first duly sworn, say: I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 3435 Wilshire Boulevard, Twenty-eighth Floor, Los Angeles, California. On June 7, 1973, I served a copy of the within NOTICE OF NON-OPPOSITION TO MOTION TO STRIKE ANSWER OF SOUTHERN CALIFORNIA FINANCIAL CORPORATION on the parties listed below in said action by depositing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Joseph J. Weissman
Elaine Sperling
6922 Hollywood Boulevard
Hollywood, California 90028

William D. Keller, U.S. Attorney
Frederick M. Brosio, Jr., Assistant
U.S. Attorney, Chief, Civil Division
Bryan N. Freeman, Asst. U.S.
Attorney
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012

Executed at Los Angeles, California, on this 7th day of June, 1973.

/s/ DEE RUTHERFORD
Dee Rutherford, Affiant

Subscribed and sworn to before me on this 7th day of June, 1973.

/s/ LOLA R. KAY
Lola R. Kay
Notary Public in and for
said county and state.

APPENDIX I.

Order Striking Portions of Answer of Defendant Southern California Financial Corporation to Complaint in Condemnation (As to Tract D-496-2).

United States District Court, Central District of California.

United States of America, Plaintiff, v. 214.69 Acres of Land, More or Less, Situate in Riverside County, State of California, et al., Defendants. No. 72-1505-JWC Civil.

FILED: June 12, 1973.

The plaintiff, United States of America, having filed its Motion to Strike Answer of Defendant Southern California Financial Corporation to Complaint in Condemnation on May 17, 1973, the defendant Southern California Financial Corporation having filed its Notice of Non-Opposition to said motion, and good cause appearing therefor,

IT IS HEREBY ORDERED that the following portions of defendant Southern California Financial Corporation's answer be stricken:

1. Paragraph 3, on pages 1 and 2;
2. Paragraph 5, on page 2;
3. First Affirmative Defense, paragraph 8, on page 3;
4. Second Affirmative Defense, paragraphs 9 through 13, inclusive, on pages 3 and 4;

5. Paragraphs 1, 2 and 3, on page 4.

DATED: This 18th day of June, 1973.

/s/ Jesse W. Curtis
United States District Judge

PRESENTED BY:

WILLIAM D. KELLER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

By /s/ BRYAN N. FREEMAN,
Bryan N. Freeman
Assistant U. S. Attorney

Attorneys for Plaintiff,
United States of America

I, CARON RHODES, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on June 15, 1973, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an evelope bearing the requisite postage, a copy of ORDER STRIKING PORTIONS OF ANSWER OF DEFENDANT SOUTHERN CALIFORNIA FINANCIAL CORPORATION TO COMPLAINT IN CONDEMNATION, addressed to McKENNA, FITTING & FINCH, 3435 Wilshire Blvd., 24th Floor, Los Angeles, Calif. 90010. ATTENTION: ROBERT E. MANGELS, ESQ. at their last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on June 15, 1973, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ CARON RHODES
Caron Rhodes

APPENDIX J.

Constitutional Provision and Statutes

This action involves the following constitutional provision and statutes:

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tucker Act, 28 U.S.C. §1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records,

and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

"Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority."

The Declaration of Taking Act, 40 U.S.C. §258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender

possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

10 U.S.C. §2663:

(a) The Secretary of a military department may have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land, including temporary use, needed for—

(1) the site, construction, or operation of fortifications, coast defenses, or military training camps;

(2) the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives or other munitions of war; or

(3) the development and transmission of power for the operation of plants under clause (2).

(b) In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired.

(c) The Secretary of the military department concerned may contract for or buy any interest in land, including temporary use, needed for any purpose named in subsection (a), as soon as the owner fixes a price for it and the Secretary considers that price to be reasonable.

(d) The Secretary of the military department concerned may accept for the United States a gift of any interest in land, including temporary use, for any purpose named in subsection (a).

10 U.S.C. §9773:

(a) The Secretary of the Air Force shall determine the sites of such additional permanent air bases and depots in all strategic areas of the United States and the Territories, Commonwealths, possessions, and holdings as he considers necessary. He shall determine when the enlargement of existing air bases and depots is necessary for the effective peacetime training of the Air Force.

(b) In determining the sites of new air bases and depots, the Secretary shall consider the following regions for the purposes indicated—

(1) the Atlantic northeast, for training in cold weather and in fog;

(2) the Atlantic southeast and Caribbean areas, for training in long-range operations, especially those incident to reinforcing the defenses of the Panama Canal;

(3) the southeastern United States, to provide a depot necessary to maintain the Air Force;

(4) the Pacific northwest, to establish and maintain air communication with Alaska;

(5) Alaska, for training under conditions of extreme cold;

(6) the Rocky Mountain area, to provide a depot necessary to maintain the Air Force, and for training in operations from fields in high altitudes; and

(7) other regions, for the establishment of intermediate air bases to provide for transcontinental movements of the Air Force for maneuvers.

(c) In selecting sites for air bases and depots covered by this section and in determining the alteration or enlargement of existing air bases or depots, the Secretary shall consider the need—

(1) to form the nucleus for concentration of Air Force units in time of war;

(2) to permit, in time of peace, training and effective planning in each strategic area for the use and expansion of commercial, municipal, and private flying installations in time of war;

(3) to locate, in each strategic area in which it is considered necessary, adequate storage facilities for munitions and other articles necessary to facilitate the movement, concentration, maintenance, and operation of the Air Force; and

(4) to afford the maximum warning against surprise attack by enemy aircraft upon aviation of the United States and its necessary installations consistent with maintaining, in connection with existing or contemplated landing fields, the full power of the Air Force for operations necessary in the defense of the United States, and in the defense and reinforcement of the Territories, Commonwealths, possessions, and holdings.

(d) In carrying out this section, the Secretary, on behalf of the United States, may acquire title, in fee simple and free of encumbrance, to any land that he considers necessary—

(1) by accepting title without cost to the United States;

(2) by exchanging military reservations or parts thereof for that land, upon the written approval of the President; or

(3) by purchase or condemnation, if acquisition by gift or exchange is impracticable.

(e) The Secretary may, by purchase, gift, lease, or otherwise, acquire at desired locations bombing and machine

gun ranges necessary for practice by, and the training of, tactical units.

(f) At each air base or depot established under this section, the Secretary shall remove or remodel existing structures as necessary; do necessary grading; and provide buildings, utilities, communication systems, landing fields and mats, roads, walks, aprons, docks, runways, facilities for the storage and distribution of ammunition, fuel, oil, necessary protection against bombs, and all appurtenances to the foregoing.

(g) The Secretary may direct the transportation of personnel, and the purchase, renovation, and transportation of material, that he considers necessary to carry out this section.

No. 80-1296

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ROBERT L. KLARQUIST
MARIA A. IIZUKA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1296

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the acquisition by the Air Force of successive term easements in property owned by petitioner constitutes a taking of the fee simple interest in petitioner's land for which additional compensation is due.

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OPINIONS BELOW

The opinion of the Trial Division of the Court of Claims (Pet. App. 1-39) is not reported. The opinion of the Court of Claims (Pet. App. 40-49) is reported at 634 F. 2d 521.

JURISDICTION

The judgment of the Court of Claims was entered on September 10, 1980. A petition for rehearing *en banc* was denied on October 31, 1980 (Pet. App. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

In 1969, petitioner Southern California Financial Corporation purchased a 119.5-acre tract that is adjacent to an ammunition storage dump located on March Air Force Base, Riverside County, California. From 1949 until 1962, the Air Force acquired by contract term negative easements in the subject property, which serves as a safety and buffer strip. From 1962 to the present, the Air Force has condemned one-year easements in five-year blocks. The estate condemned by the United States is a nonexclusive term extendible for yearly periods at the election of the United States; the right to cultivate the land is reserved to petitioner. Residential development and similar uses are forbidden under the terms of the leases; structures for human habitation may not be built or maintained; and gatherings of more than 25 persons are forbidden (Pet. App. 40-42).

When the then-current lease was about to expire in 1972, petitioner asked the United States to purchase the fee. The United States filed a declaration of taking in 1972 to condemn a negative easement lease (Pet. App. 57). At that time, petitioner raised the defense that the successive series of leases amounted to a condemnation of the fee (*id.* at 64). Upon a motion by the United States, the United States District Court for the Central District of California struck the answer (*id.* at 18, 66).

In 1974, petitioner brought suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, alleging that the successive term easements constituted a taking of the fee simple for which additional compensation was due. A trial was held in 1978, after which the trial judge found for petitioner and ordered that a second trial be held to decide the issue of just compensation (Pet. App. 39). The Court of Claims reversed, holding that no compensable taking of a fee or perpetual easement had occurred because the Air Force lacked the authority to do so (*id.* at 49). A petition for rehearing en banc was denied.

ARGUMENT

The decision of the Court of Claims is correct and conflicts with no decision of this Court or of any court of appeals. The petition presents no issue warranting further review.

Petitioner contends that the acquisition by the Air Force of successive term easements in property owned by petitioner constitutes a taking of a fee simple interest for which additional compensation is due. Petitioner erroneously states that the United States has taken "a greater interest in land than that specified in the declaration of taking" (Pet. 7). In fact, the only property interest that the United States has sought or obtained is a term easement. The Court of Claims agreed, holding that no compensable taking of a fee or perpetual easement had occurred (Pet. App. 43).

The United States has the power to acquire, by purchase or condemnation, any interest in land deemed appropriate. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). The amount and the character of the land to be taken rests within the discretion of the legislative branch and the acquiring agency. *Berman* v. *Parker*, 348 U.S. 26, 35 (1954); *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546,

551-552 (1946). Petitioner apparently challenges the authority of the Air Force, an agency of the United States, to determine the kind of interest in property that it will take, by castigating the Air Force for failing to "utilize an available appropriation procedure" (Pet. 17). That challenge is without merit. The "appropriation procedure" to which petitioner refers is the seeking of funds under the annual Department of Defense appropriation bill.[1] Where the Air Force seeks to acquire any interest in land with a value exceeding $50,000, it is required to seek congressional authorization (Pet. App. 44). See 10 U.S.C. 2233a, 2672. As the Court of Claims properly noted (Pet. App. 47), "[t]he Air Force was not empowered by itself to take a fee or indefinite easement on plaintiff's land, nor was it authorized to take successive one-year easements intending those easements to be permanent or without limit in time. In the face of the express requirement to seek Congressional consent in a Military Construction Authorization statute, there can be no implied authority to take a permanent or indefinite interest apart from that route." Consequently, while the Air Force is authorized to condemn a leasehold interest in the subject property, it currently lacks statutory authority to condemn a greater interest without express congressional authority and, as the Court of Claims recognized (*ibid.*), a holding that the entire fee was taken would undermine Congress' authority to control the extent of property interests acquired by federal agencies.

A court's function in reviewing condemnation cases is concluded when the court establishes the requisite statutory authority and propriety of the public purpose. *Berman* v. *Parker*, 348 U.S. 26 (1954). If a court were to exceed that

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[1]See, *e.g.*, Pub. L. No. 92-204, 85 Stat. 716 (appropriating funds for the Department of Defense for the fiscal year ending June 30, 1972).

narrowly defined role, the United States, through its agencies, would be denied the authority to acquire by eminent domain the particular type of interest in land it deemed necessary. The trial judge erroneously concluded that the Air Force had the intention "to continue to condemn such leases for the same purpose, into the indefinite future * * *," and that petitioner had thus been deprived of all use of his property (Pet. App. 7). While the trial judge, in his findings, concluded that "[t]he United States * * * has a permanent need for the subject property" (*id.* at 18), the complaint in condemnation specifically stated that "[t]he estate taken for said public uses is a non-exclusive term for years beginning July 1, 1972, and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1977 * * *" (Pet. App. 52). Thus, it is erroneous for petitioner to conclude that "since the Government has a permanent need for the subject property as a safety and buffer zone for the ammunition storage area (App. A, Findings 14-18), petitioner will never be restored to unrestricted possession of the property and will never be able to develop it" (Pet. 4-5).

The authority of the United States to take less than a fee simple interest in property is clearly defined. The Declaration of Taking Act, ~~ch. 297~~, 46 Stat. 1421, 40 U.S.C. 258(a), provides in part:

> Upon the filing of said declaration of taking and of the deposit in the Court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America * * *.

The specific authority for the temporary taking of petitioner's property is found in 10 U.S.C. 2663 and 10 U.S.C. 9773. 10 U.S.C. 2663(a) provides:

> The Secretary of a military department may have proceedings brought in the name of the United States * * * to acquire by condemnation any interest in land, including temporary use * * *.

In rejecting the defense of the Air Force that it lacked the authority to purchase the fee interest in petitioner's property (Pet. App. 9), the trial judge found that the "Government's motive is simply economy" (Pet. App. 4). That motive, however, is hardly impermissible: "[T]he Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554 (1946).

The taking of a series of term easements in a piece of property cannot be construed as an attempt, deliberate or otherwise, to take property rights without just compensation. Petitioner attempts to analogize the successive term easements condemned here by the United States to actions taken by the United States that resulted in an unforeseen taking of property. In so doing, petitioner attempts to rewrite the law of inverse condemnation to provide that mere successive leaseholds in a condemnee's property can constitute a taking of the fee, without regard to whether the government's action actually impairs the condemnee's ability to use the property. Petitioner cites *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922), a case that is clearly distinguishable. In *Portsmouth*, this Court held that the cumulative effect of certain direct physical invasions of the landowner's property amounted to a taking. In the present case, the maintenance of an ammunition dump by the Air Force on government property cannot be considered a tortious invasion or trespass of petitioner's property. Further, while the United States Army inflicted the trespass on a nearby existing hotel in *Portsmouth*, petitioner purchased the property over fifteen years after the Air Force had begun to use its property as an ammunition dump site. The Court of Claims noted "(a) that, unlike

Portsmouth and [*United States* v.] *Causby*, [328 U.S. 256 (1946)], there was no existing physical intrusion onto plaintiff's land through Air Force activities on adjacent March Air Force Base, and (b) that it is unlikely that the mere danger from the adjacent ammunition dump, not involving any existing invasion of plaintiff's land, would constitute, in itself, a Fifth Amendment taking" (Pet. App. 47 n.6).

By their very nature, successive term acquisitions are uncertain of duration. At military bases, the future need for land is particularly subject to numerous contingencies, and the United States must necessarily have the flexibility to acquire an interest in land less than the fee.

In seeking to have this Court consider whether the successive term easements constitute a taking of the fee, petitioner is, in reality, questioning the compensation that it has been receiving since 1969. The trial judge made a finding that the highest and best use of the property is "to hold it for speculation for future residential development" (Pet. App. 38, Finding No. 70). The obvious question, in view of this finding is: in what way does the term easement, with its annual rental payments from the United States, prevent or diminish the petitioner's ability to hold the property for some future use? Petitioner is receiving just compensation for an easement over property whose very limited uses are acknowledged.

Finally, petitioner suggests that a reversal by this Court of a case presently pending, No. 79-678, *San Diego Gas & Electric Co.* v. *City of San Diego*, would mandate a reversal of the holding of the Court of Claims here. There is no merit to that assertion in light of the totally different legal theories involved in the two cases. *San Diego Gas & Electric Co.* deals with rezoning by the City of San Diego of land held by a utility, which, in the utility's view, amounted to a taking without just compensation. The California Court of

Appeals held that there was no compensable taking under the California constitution. This Court's holding in that case will be plainly irrelevant to the present case inasmuch as petitioner was awarded full just compensation for the condemned easement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ROBERT L. KLARQUIST
MARIA A. IIZUKA
Attorneys

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